FILE COPY.

Office Supreme Court, U. S.
FILED
APR 13 1914
JAMES D. MAHER
CLERK

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1913.

No. 2 ORIGINAL.

COMMONWEALTH OF VIRGINIA
)
vs.) In Equity.
)
STATE OF WEST VIRGINIA.

BRIEF ON BEHALF OF WEST VIRGINIA IN OPPOSITION TO INTEREST.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1913.

No. 2 ORIGINAL.

COMMONWEALTH OF VIRGINIA
)
vs.) In Equity.
)
STATE OF WEST VIRGINIA.

I.

STATES NOT CHARGEABLE WITH INTEREST IN THE ABSENCE OF A LEGISLATIVE OR OFFICIAL PROMISE.

It is a firmly fixed rule of universal recognition that interest is not to be awarded against a State unless its consent has been manifested by an act of

its Legislature or by a lawful contract of its executive officers.

U. S. v. State of North Carolina, 136 U. S., 211; 34 L. Ed., 336.

South Dakota v. North Carolina, 192 U. S., 321; 48 L. Ed., 462.

U. S. ex. rel. McCloud v. Jno. Sherman, Secy., 98 U. S., 535; 25 L. Ed., 235.

U. S. v. Sargent, 162 Fed. Rep., 81.

Nat'l Home for Disabled Volunteer Soldiers et al. v. Parrish, 194 Fed. Rep., 940.

U. S. v. Bayard, 127 U. S., 251-60.

II.

WEST VIRGINIA'S PROMISE TO PAY INTEREST, IF ANY SHE MADE, WAS CONDITIONAL, AND NOT ABSOLUTE.

Pursuant to the above rule, therefore, and in order to determine whether or not West Virginia is chargeable with interest upon her equitable proportion of the principal of the Virginia debt existing prior to January 1, 1861, it becomes necessary to ascertain from the terms of her contract by which she became responsible for a part of the principal whether or not she also promised to pay interest thereon, and, if so, whether or not such promise was absolute or conditional.

As held by this Court (Va. v. W. Va., 220 U. S., 1), the contract of West Virginia springs out of Section 8 of Article 8 of her Constitution of 1861, the

Act of the Legislature of the restored State of Virginia passed May 13, 1862, giving consent to the erection of the new State under the provisions of said Constitution, and the Act of Congress passed December 31, 1862, consenting, upon the faith of both, to the creation of said State.

The constitutional provision, therefore, must be looked to for the purpose of ascertaining the terms of the agreement, and it reads as follows:

> "An equitable proportion of the public debt of the Commonwealth of Virginia, prior to the first day of January, in the year one thousand, eight hundred and sixty-one shall be assumed by this State; and the Legislature shall ascertain the same as soon as may be practicable, and provide for the liquidation thereof by a sinking fund sufficient to pay the accruing interest, and redeem the principal within thirty-four years."
>
> W. Va. Constitution 1861, Art. 8, Sec. 8.

Here is a promise to pay an equitable proportion of the Virginia debt, and a like promise to establish "a sinking fund sufficient to pay the accruing interest, and redeem the principal within thirty-four years"; but both promises have two qualifications attached thereto: *First*, she was not to contribute to the payment of any indebtedness of Virginia, whether principal or interest, accruing after the first day of January, 1861, and, *secondly*, she could not, and was not to establish the promised sinking fund until after her equitable proportion of the debt had been first ascertained.

It is true that any overdue and unpaid interest existing prior to the first day of January, 1861, might be treated as a part of the principal debt as of that date, and she compelled to contribute an equitable proportion to the payment thereof, but not so with any interest accruing upon the Virginia debt after that time; because, by her contract, she firmly fixed the first day of January, 1861, as the date beyond which no indebtedness should accrue to the payment of which she would contribute.

Evidently she contemplated the payment of interest upon her equitable proportion of the debt after the same had been ascertained, but not before. After its ascertainment, the amount so fixed would become the principal of her debt, which, according to the sinking fund provision, would bear interest from that time, but no sooner or otherwise.

This construction is in keeping with the rule of law that interest is not chargeable upon an unliquidated amount.

Redfield v. Ystalyfera Iron Co., 110 U. S., 174; 28 L. Ed., 109.

Stevens v. Phoenix Bridge Co., 139 Fed Rep., 248.

In Redfield v. Ystalfera Iron Co., *supra,* Mr. Justice Matthews said:

> "In ordinary practice, it may be convenient, and certainly would not be improper nor unjust that interest propertly allowed on the real amount, subsequently ascertained, should be calculated from the date of such a verdict; but in such cases it is not interest on the verdict in fact, because, *until the amount is liquidated by the sub-*

sequent action of the Court, there is no sum certain due on which interest could be computed."

And in Stevens v. Phoenix Bridge Co., *supra,* it was said that—

> "Interest is not recoverable on a demand which is unliquidated, and which is subject to a counter claim also unliquidated."

The Virginia authorities upon the subject are:

Auditor of Public Accounts v. Dagger & Foley, 3 Leigh (Va.), 241.

Phillips et al. v. Williams, 5 Gratt. (Va.), 258.

M'Connico et al., Exrs. of Holloway, v. Curzen, 2 Call (Va.), 358.

Skipwith v. Clinch, 2 Call (Va.), 253.

Waggoner v. Gray's Admrs., 2 H. & M. (Va.), 603.

Stearns v. Mason, 24 Gratt. (Va.), 484.

III.

WEST VIRGINIA'S EQUITABLE PROPORTION OF VIRGINIA DEBT WAS NOT ASCERTAINED, IF FIXED AT ALL, UNTIL THE DECISION OF THIS COURT ON MARCH 6, 1911.

Neither the Legislature of West Virginia nor the Legislature of Virginia, standing alone, had the power to ascertain West Virginia's equitable proportion of the Virginia debt, and the two States, through all the years that have passed, have taken

no joint action, and, in consequence, the ascertainment of West Virginia's proportion of the debt has remained unliquidated and unfixed. There has never been a moment of time from the adoption of the West Virginia Constitution of 1861, or from the establishment of the State in 1863, that West Virginia could have established the sinking fund promised in the Eighth Article of her Constitution. She could lay no levy, and could fix no rate, because she did not know what she had to meet. She did not have the power to fix the amount herself, and she was unwilling to permit Virginia to do so arbitrarily. For the first time in fifty years, the basis of liability was fixed by this Court in its finding and opinion of March 6, 1911, and that finding was provisional; and, if West Virginia should be permitted by this Court to apply the credits thereto that she now claims, interest could only be calculuated upon the balance from the time the balance is ascertained, unless this Court should be of the opinion that West Virginia has actively prevented the ascertainment of her proportion of the debt, and to this suggestion we will now briefly address ourselves.

IV.

WEST VIRGINIA NOT AT FAULT.

From the adoption of her Constitution in 1861 until her admission into the Union in 1863, West Virginia had no power to act, because she had not become a State. From 1863 until 1866, the two States were at war, and nothing could be done. In

1866, Virginia filed a bill in this Court against West Virginia, attacking the integrity of her territory, and claiming jurisdiction over the Counties of Berkeley, Jefferson and Frederick, which suit was not decided until the sixth day of March, 1871, and, during its pendency, it was uncertain what constituted West Virginia, and her action upon the debt question was thereby prevented and postponed. Immediately following this; that is to say, upon the 15th day of March, 1871, the Governor of West Virginia, pursuant to a joint resolution of her Legislature, appointed a Commission to negotiate a settlement of the debt question with the Commonwealth of Virginia. This Commission proceeded without unnecessary delay to the Capitol of Virginia for the purpose of carrying out the objects of its appointment, but was met with a refusal upon the part of Virginia to negotiate, and West Virginia was once more powerless. Shortly after this; that is to say, on March 30, 1871, the State of Virginia, without consulting West Virginia, took the matter into her own hands, and, by legislative enactment, arbitrarily fixed West Virginia's portion of the debt one-third, thus making it impossible for West Virginia to do anything in the premises; and there the matter remained practically until immediately before the institution of this suit. West Virginia, it is therefore respectfully submitted, has not been at fault, and has not been the cause of the postponement of this settlement.

Upon the other hand, Virginia has had it in her power for more than forty years to institute this suit, and ascertain through this tribunal West Vir-

ginia's equitable proportion of her debt. Instead, she neglected so to do, and has caused, by her neglect and delay, the very time to run upon which she now seeks to charge interest.

It is, therefore, respectfully submitted that West Virginia should not be charged with interest until after the ascertainment of her equitable proportion of the debt, as promised in her Constitution.

Respectfully submitted,

A. A. LILLY,

CHARLES E. HOGG,

and

JOHN H. HOLT,

Associate Counsel
for West Virginia.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1913.

No. 2 ORIGINAL.

COMMONWEALTH OF VIRGINIA
)
vs.) In Equity.
)
STATE OF WEST VIRGINIA.

BRIEF ON BEHALF OF WEST VIRGINIA IN OPPOSITION TO INTEREST.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1913.

No. 2 ORIGINAL.

COMMONWEALTH OF VIRGINIA
)
vs.) In Equity.
)
STATE OF WEST VIRGINIA.

I.

STATES NOT CHARGEABLE WITH INTEREST IN THE ABSENCE OF A LEGISLATIVE OR OFFICIAL PROMISE.

It is a firmly fixed rule of universal recognition that interest is not to be awarded against a State unless its consent has been manifested by an act of

its Legislature or by a lawful contract of its executive officers.

U. S. v. State of North Carolina, 136 U. S., 211; 34 L. Ed., 336.

South Dakota v. North Carolina, 192 U. S., 321; 48 L. Ed., 462.

U. S. ex. rel. McCloud v. Jno. Sherman, Secy., 98 U. S., 535; 25 L. Ed., 235.

U. S. v. Sargent, 162 Fed. Rep., 81.

Nat'l Home for Disabled Volunteer Soldiers et al. v. Parrish, 194 Fed. Rep., 940.

U. S. v. Bayard, 127 U. S., 251-60.

II.

WEST VIRGINIA'S PROMISE TO PAY INTEREST, IF ANY SHE MADE, WAS CONDITIONAL, AND NOT ABSOLUTE.

Pursuant to the above rule, therefore, and in order to determine whether or not West Virginia is chargeable with interest upon her equitable proportion of the principal of the Virginia debt existing prior to January 1, 1861, it becomes necessary to ascertain from the terms of her contract by which she became responsible for a part of the principal whether or not she also promised to pay interest thereon, and, if so, whether or not such promise was absolute or conditional.

As held by this Court (Va. v. W. Va., 220 U. S., 1), the contract of West Virginia springs out of Section 8 of Article 8 of her Constitution of 1861, the

Act of the Legislature of the restored State of Virginia passed May 13, 1862, giving consent to the erection of the new State under the provisions of said Constitution, and the Act of Congress passed December 31, 1862, consenting, upon the faith of both, to the creation of said State.

The constitutional provision, therefore, must be looked to for the purpose of ascertaining the terms of the agreement, and it reads as follows:

> "An equitable proportion of the public debt of the Commonwealth of Virginia, prior to the first day of January, in the year one thousand, eight hundred and sixty-one shall be assumed by this State; and the Legislature shall ascertain the same as soon as may be practicable, and provide for the liquidation thereof by a sinking fund sufficient to pay the accruing interest, and redeem the principal within thirty-four years."
>
> W. Va. Constitution 1861, Art. 8, Sec. 8.

Here is a promise to pay an equitable proportion of the Virginia debt, and a like promise to establish "a sinking fund sufficient to pay the accruing interest, and redeem the principal within thirty-four years"; but both promises have two qualifications attached thereto: *First*, she was not to contribute to the payment of any indebtedness of Virginia, whether principal or interest, accruing after the first day of January, 1861, and, *secondly*, she could not, and was not to establish the promised sinking fund until after her equitable proportion of the debt had been first ascertained.

It is true that any overdue and unpaid interest existing prior to the first day of January, 1861, might be treated as a part of the principal debt as of that date, and she compelled to contribute an equitable proportion to the payment thereof, but not so with any interest accruing upon the Virginia debt after that time; because, by her contract, she firmly fixed the first day of January, 1861, as the date beyond which no indebtedness should accrue to the payment of which she would contribute.

Evidently she contemplated the payment of interest upon her equitable proportion of the debt after the same had been ascertained, but not before. After its ascertainment, the amount so fixed would become the principal of her debt, which, according to the sinking fund provision, would bear interest from that time, but no sooner or otherwise.

This construction is in keeping with the rule of law that interest is not chargeable upon an unliquidated amount.

Redfield v. Ystalyfera Iron Co., 110 U. S., 174; 28 L. Ed., 109.

Stevens v. Phoenix Bridge Co., 139 Fed Rep., 248.

In Redfield v. Ystalfera Iron Co., *supra*, Mr. Justice Matthews said:

> "In ordinary practice, it may be convenient, and certainly would not be improper nor unjust that interest properly allowed on the real amount, subsequently ascertained, should be calculated from the date of such a verdict; but in such cases it is not interest on the verdict in fact, because, *until the amount is liquidated by the sub-*

sequent action of the Court, there is no sum certain due on which interest could be computed."

And in Stevens v. Phoenix Bridge Co., *supra*, it was said that—

> "Interest is not recoverable on a demand which is unliquidated, and which is subject to a counter claim also unliquidated."

The Virginia authorities upon the subject are:

Auditor of Public Accounts v. Dagger & Foley, 3 Leigh (Va.), 241.

Phillips et al. v. Williams, 5 Gratt. (Va.), 258.

M'Connico et al., Exrs. of Holloway, v. Curzen, 2 Call (Va.), 358.

Skipwith v. Clinch, 2 Call (Va.), 253.

Waggoner v. Gray's Admrs., 2 H. & M. (Va.), 603.

Stearns v. Mason, 24 Gratt. (Va.), 484.

III.

WEST VIRGINIA'S EQUITABLE PROPORTION OF VIRGINIA DEBT WAS NOT ASCERTAINED, IF FIXED AT ALL, UNTIL THE DECISION OF THIS COURT ON MARCH 6, 1911.

Neither the Legislature of West Virginia nor the Legislature of Virginia, standing alone, had the power to ascertain West Virginia's equitable proportion of the Virginia debt, and the two States, through all the years that have passed, have taken

no joint action, and, in consequence, the ascertainment of West Virginia's proportion of the debt has remained unliquidated and unfixed. There has never been a moment of time from the adoption of the West Virginia Constitution of 1861, or from the establishment of the State in 1863, that West Virginia could have established the sinking fund promised in the Eighth Article of her Constitution. She could lay no levy, and could fix no rate, because she did not know what she had to meet. She did not have the power to fix the amount herself, and she was unwilling to permit Virginia to do so arbitrarily. For the first time in fifty years, the basis of liability was fixed by this Court in its finding and opinion of March 6, 1911, and that finding was provisional; and, if West Virginia should be permitted by this Court to apply the credits thereto that she now claims, interest could only be calculuated upon the balance from the time the balance is ascertained, unless this Court should be of the opinion that West Virginia has actively prevented the ascertainment of her proportion of the debt, and to this suggestion we will now briefly address ourselves.

IV.

WEST VIRGINIA NOT AT FAULT.

From the adoption of her Constitution in 1861 until her admission into the Union in 1863, West Virginia had no power to act, because she had not become a State. From 1863 until 1866, the two States were at war, and nothing could be done. In

1866, Virginia filed a bill in this Court against West Virginia, attacking the integrity of her territory, and claiming jurisdiction over the Counties of Berkeley, Jefferson and Frederick, which suit was not decided until the sixth day of March, 1871, and, during its pendency, it was uncertain what constituted West Virginia, and her action upon the debt question was thereby prevented and postponed. Immediately following this; that is to say, upon the 15th day of March, 1871, the Governor of West Virginia, pursuant to a joint resolution of her Legislature, appointed a Commission to negotiate a settlement of the debt question with the Commonwealth of Virginia. This Commission proceeded without unnecessary delay to the Capitol of Virginia for the purpose of carrying out the objects of its appointment, but was met with a refusal upon the part of Virginia to negotiate, and West Virginia was once more powerless. Shortly after this; that is to say, on March 30, 1871, the State of Virginia, without consulting West Virginia, took the matter into her own hands, and, by legislative enactment, arbitrarily fixed West Virginia's portion of the debt one-third, thus making it impossible for West Virginia to do anything in the premises; and there the matter remained practically until immediately before the institution of this suit. West Virginia, it is therefore respectfully submitted, has not been at fault, and has not been the cause of the postponement of this settlement.

Upon the other hand, Virginia has had it in her power for more than forty years to institute this suit, and ascertain through this tribunal West Vir-

ginia's equitable proportion of her debt. Instead, she neglected so to do, and has caused, by her neglect and delay, the very time to run upon which she now seeks to charge interest.

It is, therefore, respectfully submitted that West Virginia should not be charged with interest until after the ascertainment of her equitable proportion of the debt, as promised in her Constitution.

Respectfully submitted,

A. A. LILLY,

CHARLES E. HOGG,

and

JOHN H. HOLT,

Associate Counsel
for West Virginia.

FILE COPY.

Office Supreme Court, U. S.
FILED
APR 13 1914
JAMES D. MAHER
CLERK

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1913.

No. 2 ORIGINAL.

COMMONWEALTH OF VIRGINIA
)
vs.) In Equity.
)
STATE OF WEST VIRGINIA.

ADDITIONAL BRIEF OF WEST VIRGINIA IN SUPPORT OF THE MOTION FOR LEAVE TO FILE A SUPPLEMENTAL ANSWER.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1913.

No. 2 ORIGINAL.

COMMONWEALTH OF VIRGINIA
)
vs.) In Equity.
)
STATE OF WEST VIRGINIA.

I.

STATEMENT OF FACTS.

The motion of West Virginia is for leave to file the supplemental answer presented with the motion for the inspection of the Court, and it is based, as we understand it, and certainly as it was intended,

upon the decision of this Court in this cause of March 6, 1911, and upon the investigations and discoveries of the West Virginia Commission that was appointed to negotiate with a like Commission of the State of Virginia an amicable settlement of the controversy, pursuant to the suggestion of this Court in said opinion.

Very briefly, and by way of premise, we will look to both in order to determine whether or not the motion is justified.

The decision of March 6, 1911, held—

First, that West Virginia was obligated to pay an equitable proportion of the Virginia debt existing prior to the first day of January, 1861. So much has been settled, and finally settled, by this Court, and its conclusion is not questioned, either by Virginia or by West Virginia;

Secondly, that the total debt existing as of that date to be apportioned between the two States amounted, in round numbers, to $30,000,000.00, and,

Third, that, taking the relative resources of the two debtor populations, exclusive of slaves, the debt should be apportioned in the ratio of 76½% to Virginia, and 23½% to West Virginia, and, upon this basis, West Virginia's equitable proportion of the principal of said debt was ascertained to be $7,182,507.46.

The Court, however, did not enter a decree for this amount against West Virginia; but, believing that enough had been said "for patriotism, the fraternity of the Union and mutual consideration to bring it to an end", suggested a conference between the two States.

Va. v. W. Va., 220 U. S., page 1.

Pursuant to this suggestion or warning, West Virginia, as speedily as practicable, appointed a Commission for the purpose of negotiating with a like Commission upon the subject from the State of Virginia. The first meeting of the Commissions amounted to little or nothing; but, after their adjournment, a sub-committee of the West Virginia Commission was appointed, for the purpose of investigating in detail the existence, disposition and value of any assets purchased with the common funds that Virginia might have appropriated to her own use, and for the proper per cent. of which West Virginia should be allowed a credit. This investigation was suggested by and based upon another statement in the opinion of March 6, 1911. It was there said by the Court, speaking through Mr. Justice Holmes, that—

> "The whole State would have got the gain, and the whole State must bear the loss, as it does not appear that there are any stocks of value on hand."
>
> (220 U. S., page 30; 55 L. Ed., 358.)

The investigation was made upon the theory that West Virginia was entitled to a proper per cent. of the assets, and upon the belief that, had they been presented to the Court, they would have been allowed. The sub-committee employed expert accountants, who investigated as best they could, in the time left them, the records of Virginia from the year 1820 until the present time, with the result that they reported to the Commission that Virginia had

appropriated to her own exclusive use, outside of public buildings—they were not taken into the account at all—assets that had been purchased with the common funds of the two States prior to January 1, 1861, and disposed of by Virginia, without any accounting at all, since June 20, 1863, amounting in actual value to $20,000,000.00 and more. Twenty-three and one-half per cent. of this amount was taken and deducted from the $7,182,507.46 of principal ascertained by this Court to be West Virginia's equitable proportion of the debt, leaving a balance of $2,327,195.27, which amount the West Virginia Commission offered to the Virginia Commission to pay in full satisfaction of the controversy. The proposition, however, was declined, and then the present motion was made.

Such is the history of the motion; and the proposed supplemental answer alleges that the disposition and value of the assets now presented were unknown to West Virginia at the time she filed her original answer herein, and were likewise unknown to her at the date of this Court's opinion of March 6, 1911.

II.

VIRGINIA'S RESPONSE TO THE MOTION.

The main point in the response of Virginia to the motion is an allegation to the effect that West Virginia was fully informed all the time concerning the common assets now presented by her, and 23½% of which she claims as a credit upon her proportion of the principal of the debt; that it is not true

that she obtained her information in relation thereto, as alleged in her proposed supplemental answer, subsequent to the filing of her original answer, and subsequent to the opinion of the Court of March 6, 1911; but that all of the matters and things now set up by her were fully set forth in detail in the report of a Commission appointed by her, known as the "Bennett Commission", in the year 1871, and heretofore embodied in the record of this cause.

In answer to this contention, it will be sufficient to say that it is inaccurate and misleading.

In the first place, the proposed supplemental answer does not allege that West Virginia had no knowledge whatever of the fact that Virginia had from time to time prior to the first day of January, 1861, invested certain of the common moneys of the two States in works of internal improvement, but it alleges that she did not know at the time of the filing of her original answer of the disposition and value of the stocks and securities evidencing these investments; that she only learned since the oppointment of, and through her recent Commission, that these securities had any actual value at all, and that they had been either retained by Virginia or sold by her subsequent to June 20, 1863, and the proceeds of such sales appropriated to her own exclusive use, without any report of the fact or accounting unto her *cestui que trust*, the State of West Virginia.

The Bennett report lists some, but not all, of the investments of the Commonwealth of Virginia in internal improvement companies, and contents itself with stating the amount of moneys that had been originally so devoted; but it does not anywhere

undertake to show which of these securities, if any, were still on hand, or what the actual value of any of them was. Neither does it show their disposition or sale, or the appropriation of the proceeds thereof by the State of Virginia. Indeed, the fact is that, with rare exception, all of these assets have been disposed of by the State of Virginia since the year 1871; that is to say, since the Bennett report.

West Virginia had no record of these sales, or of the amounts received thereon. She had no knowledge, as alleged in her answer, of the fact that they had any value at all. These matters were not in her archives, but in the archives and records of Virginia, which she has caused to be examined through her Commission since the last continuance, and the facts to be reported to her officially and reliably for the first time.

It is now easy for Virginia to say that her records were open all the time to West Virginia, and that, if she had taken the pains to examine the same, she would have been informed concerning these matters long since; but such was not the reception that was given, as shown by the record in this cause, to the West Virginia, or so-called Bennett Commission, in the year 1871.

In addition to this, attention is called to the fact that, when this case was originally argued upon demurrer, it was upon the theory that the settlement was proceeding upon the basis of the Wheeling Ordinance, which would not call for an ascertainment of these assets, and the decree of reference was along that line. After the report of the Master, however, the Court reached the conclusion that a settlement

in accordance with the Wheeling Ordinance would be arbitrary and inequitable, and proceeded to ascertain West Virginia's equitable proportion of the principal of the debt by another and more equitable method, and, finding no stocks or other securities on hand of value, left the ascertainment at $7,182,507.46 without abatement for any reason.

III.

REASONS WHY THE MOTION SHOULD PREVAIL.

1. The assets in question constituted a trust fund under the Constitution of Virginia of 1851, to be devoted to the payment of the Virginia debt, and, if Virginia has diverted this fund to other purposes, she must account, and an accounting between her and West Virginia, upon the basis of West Virginia's liability as fixed by this Court, would compel her to give credit to the latter for 23½% of the actual value of such assets.

New Orleans v. Warner, 175 U. S., 120.

Section 29 of the Constitution referred to reads in part as follows:

> "29. There shall be set apart annually, from the accruing revenues, a sum equal to 7% of the State debt existing on the first day of January, in the year one thousand eight hundred and fifty-two. The fund thus set apart shall be called the sinking fund, and shall be applied to the payment of the interest of the State debt, and the principal of such part as may be redeemable."
>
> (Code of Virginia 1860, page 47.)

And Section 30 of said Constitution reads

> "The Generaly Assembly may, at any time, direct a sale of the stocks held by the Commonwealth in internal improvement and other companies; but the proceeds of such sale, if made before the payment of the public debt, shall constitute a part of the sinking fund, and be applied in like manner."
>
> (Code of Virginia 1860, page 47.)

2. The debt in question was created in the purchase of the assets presented, and, if West Virginia must pay 23½% of the debt, she should, in equity, receive a credit for 23½% of the actual value of the assets.

3. The fact that these assets had any actual value was discovered by West Virginia since the last continuance of this cause.

4. Virginia had full knowledge of the value and disposition of these assets all the time, and the evidence thereof was confined to her own records, but she did not voluntarily disclose the same, although her suit was instituted for the purpose of ascertaining West Virginia's *equitable* proportion of the debt.

5. The decree of reference herein proceeded upon the theory that the Wheeling Ordinance was to furnish the basis of settlement, and this basis did not call for a disclosure of the existence, disposition or value of these assets.

6. This Court has wisely prescribed few rules for the conduct of original proceedings before it, but it has prescribed rules for the conduct of such proceedings in equity before inferior federal tribunals, and, upon analogy to these rules, the supplemental answer should be received.

Equity Rule No. 19 reads in part as follows:

> "The Court may, at any time, in furtherance of justice, upon such terms as it may deem just, permit any process, proceeding, pleading or record to be amended, or material supplemental matter to be set forth in an amended or supplemental pleading * * * * * * * *."

And Equity Rule No. 34 reads in part as follows:

> "Upon application of either party, the Court or Judge may, upon reasonable notice, and such terms as are just, permit him to file and serve a supplemental pleading alleging material facts occurring after his former pleading, or of which he was ignorant when it was made * * * * * * * * *."

7. "The case is to be considered in the untechnical spirit proper for dealing with a quasi-international controversy, remembering that there is no municipal code governing the matter * * * *."

Va. v. W. Va., 220 U. S., page 27.

8. Neither is it any answer to say, as has been attempted, that such a proceeding would make an endless chain of the litigation, because it must be

remembered that the whole matter is always within the discretion of the Court, and that it can, and will, prescribe such terms and conditions in granting this, or any other motion, as may be sufficient to accomplish an equitable result.

Respectfully submitted,

A. A. LILLY,
Attorney General for West Virginia.

V. B. ARCHER,

CHARLES E. HOGG,

and

JOHN H. HOLT,

Associate Counsel
for West Virginia.

FILE COPY.

Office Supreme Court, U. S.
FILED
MAR 20 1915
JAMES D. MAHER
CLERK

IN THE

Supreme Court of the United States.

October Term, 1913.

No. 2 Original.

COMMONWEALTH OF VIRGINIA

VS.

STATE OF WEST VIRGINIA.

EXCEPTIONS BY WEST VIRGINIA TO THE REPORT OF SPECIAL MASTER CHARLES E. LITTLEFIELD.

A. A. LILLY,
Atty. General for W. Va.

CHARLES E. HOGG,
JOHN H. HOLT,
Of Counsel for West Virginia.

IN THE

Supreme Court of the United States.

October Term, 1913.

No. 2 Original.

COMMONWEALTH OF VIRGINIA

VS.

STATE OF WEST VIRGINIA.

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The State of West Virginia, by A. A. Lilly, Attorney General, prays leave to file the annexed exceptions to the report of the Honorable Charles E. Littlefield, Special Master in the above entitled cause, which report was filed in this Honorable Court on the twenty-second day of January, 1915.

STATE OF WEST VIRGINIA,
By A. A. Lilly, Atty. General.

CHARLES E. HOGG,
JOHN H. HOLT,
Of Counsel.

IN THE

Supreme Court of the United States.

October Term, 1913.

No. 2 Original.

COMMONWEALTH OF VIRGINIA

VS.

STATE OF WEST VIRGINIA.

EXCEPTIONS BY WEST VIRGINIA TO THE REPORT OF SPECIAL MASTER CHARLES E. LITTLEFIELD, FILED IN THE ABOVE ENTITLED CAUSE ON JANUARY 22, 1915.

Now comes the State of West Virginia, by A. A. Lilly, her Attorney General, and excepts to the following findings in said report:

I.

DEFENDANT'S FIRST EXCEPTION. (INTEREST)

Although not a finding of fact, but a mere expression of opinion upon a question of law involved in the cause, and to the end that silence may not be treated as a waiver of the opposite view, the State of West Virginia respectfully excepts to the following conclusion and statement of the Master upon the subject of interest, found at the bottom of page ten and the top of page eleven of his report, to-wit:

> "It is my conclusion, therefore * * * that the liability of West Virginia for interest begins on that date" (January 1, 1861), "by virtue of the contract between her and Virginia, and runs at the rate provided for in the bonds that evidence the debt, and make the interest an inseparable part thereof."

II.

DEFENDANT'S SECOND EXCEPTION. (Richmond, Fredericksburg & Potomac R. R. Stock)

The defendant excepts to that portion of the report of the Special Master wherein he values the stock held by the State of Virginia in the Richmond, Fredericksburg & Potomac Railroad Company, because he averages the book value and the dividend value of said stock, instead of taking the book value

alone, and reduces thereby the actual value of the total stock held by Virginia on January 1, 1861, from $412,800 to $323,167.36, thereby diminishing West Virginia's 23½% of the actual value of this stock from $97,008 to $75,944.32, causing a loss to her of $21,063.68; and for other reasons.

Said valuation and the reasons therefor are found upon pages 32-4 of the Master's report.

III.

DEFENDANT'S THIRD EXCEPTION.

(Orange & Alexandria R. R. Stock)

The defendant excepts to the valuation placed by the Special Master upon the stock held by the State of Virginia in the Orange & Alexandria Railroad Company, because he ascertains the same by averaging its book and dividend values, instead of taking its book value alone, thereby reducing the value of said stock as of January 1, 1861, from $932,566.80 to $573,672, and diminishing West Virginia's 23½% of the actual value thereof from $219,153.19 to $134,812.92, with a consequent loss to her of $84,340.27; and for other reasons.

Said valuation and the reasons therefor are found on pages 36-8 of his said report.

IV.

DEFENDANT'S FOURTH EXCEPTION.

(Richmond & Danville R. R. Stock)

The defendant excepts to the finding of the Master with reference to the stock owned by the

State of Virginia in the Richmond & Danville R. R. Co., because he subtracts from the book value thereof of $137.37 per share 5% of its par for alleged liquidation purposes, which reduction (Virginia owning 12,000 shares) places the total value of the stock held by Virginia on January 1, 1861, at $1,588,440, instead of $1,648,440, and reduces West Virginia's 23½% interest therein from $387,383.40 to $373,283.40, with a consequent loss to her of $14,100. Said finding is otherwise erroneous and prejudicial to West Virginia.

Said valuation and finding, with the reasons therefor, are found upon pages 39-41 of the Master's report.

V.

DEFENDANT'S FIFTH EXCEPTION.

(Richmond & Petersburg R. R. Stock)

The defendant excepts to the finding of the Special Master in the case of the value of the stock as of January 1, 1861, held by the State of Virginia in the Richmond & Petersburg Railroad Company, because he combines the book value with the dividend value, instead of taking the book value alone, thereby reducing the total value of the stock as of that date from $469,892.16 to $441,126.40, and West Virginia's 23½% thereof from $110,424.65 to $103,664.70, with a consequent loss to her of $6,759.95; and for other reasons.

Said valuation and the reasons therefor are found upon pages 42-4 of the Master's report.

VI.

DEFENDANT'S SIXTH EXCEPTION.

(Virginia Central R. R. Stock)

The defendant excepts to the report of the Special Master wherein he places a value upon the stock owned by the State of Virginia in the Virginia Central Railroad Company of $2,390,918.08, instead of $2,481,115.26, a difference of $90,197.18, with a consequent loss to West Virginia on account of her 23½% interest therein of $21,196.34.

Said valuation is made by a combination of book and dividend values, instead of taking the book value alone, and is otherwise erroneous.

The finding and reasons therefor are set out on pages 45-6 of said report.

VII.

DEFENDANT'S SEVENTH EXCEPTION.

(Alexandria, Loudoun & Hampshire Stock)

The defendant excepts to the finding of the Master wherein he places a value as of January 1, 1861, upon the stock owned by the State of Virginia in the Alexandria, Loudoun & Hampshire Railroad Company of $35,096.85, instead of a value of $993,248.00, as evidenced by the par and cost of the stock, thereby reducing West Virginia's 23½% interest in this stock from $223,413.28 to $8,247.74, with a consequent loss to her of $215,165.54.

Said valuation is otherwise erroneous, and is

found, together with the reasons therefor, upon pages 48-9 of the Master's report.

VIII.

DEFENDANT'S EIGHTH EXCEPTION.
(Virginia & Tennessee R. R. Loan)

The defendant excepts to the finding of the Special Master wherein he places a value of only $84,799.90, instead of $886,685, upon a loan of $1,000,000 made by the State of Virginia to the Virginia & Tennessee Railroad Company, by which finding he reduces the 23½% interest of West Virginia therein from $208,370.97 to $19,927.97, with a consequent loss to her of $188,443.00.

Said finding and the reasons therefor are set out upon pages 51-2 of said report.

IX.

DEFENDANT'S NINTH EXCEPTION.
(Norfolk & Petersburg R. R. Loan)

The defendant excepts to the report of the Master wherein he reduces the value of the loan made by the State of Virginia to the Norfolk & Petersburg Railroad Company from $300,000 to $108,415.45, thereby reducing West Virginia's 23½% interest therein from $70,500 to $25,477.63, with a consequent loss to her of $45,022.37.

Said finding, with the reasons therefor, appear upon pages 55-8 of said report.

X.

DEFENDANT'S TENTH EXCEPTION.
(U. S. Government Loan)

The defendant excepts to that portion of the report of the Master wherein he places a value of only $164,584.30 as of January 1, 1861, upon the claim of Virginia against the Government of the United States, instead of a value as of that date of $1,130,821.31, thereby diminishing West Virginia's 23½% interest therein from $265,743.00 to $38,677.31, with a consequent loss to her of $227,065.69.

Said valuation and finding, with the reasons therefor, are found upon pages 67-70 of the Master's report.

XI.

DEFENDANT'S ELEVENTH EXCEPTION.
(Farmer's Bank of Virginia Stock)

The defendant excepts to that portion of the Master's report wherein he ascertains the value as of January 1, 1861, of the stock held by the State of Virginia in the Farmer's Bank of Virginia by deducting from the book value per share of said stock of $107.89 five per cent. of its par value to meet the supposed cost of liquidation, thereby reducing the actual value of the stock to $102.89 per share, which reduction (Virginia owning 9626 shares) places the total value of the stock at $990,419.14, instead of

$1,038,549.14, and reduces West Virginia's 23½% interest therein from $244,059.04 to $232,748.49, with a consequent loss to her of $11,310.55.

Said valuation and finding, with the reasons therefor, are found on pages 85-6 of the Master's report.

XII.

DEFENDANT'S TWELFTH EXCEPTION.
(Bank of Virginia Stock)

The defendant excepts to that portion of the Master's report wherein he ascertains the value as of January 1, 1861, of the stock held by the State of Virginia in the Bank of Virginia by deducting from the book value of $74.99 per share of said stock 5% of its par value to meet the supposed cost of liquidation, thereby reducing the actual value of the stock to $71.49 per share, which reduction (Virginia owning 13,766 shares) places the total value of the stock at $984,131.34, instead of $1,091,312.34, and reduces West Virginia's 23½% interest therein from $256,458.39 to $231,270.86, with a consequent loss to her of $25,187.53.

Said valuation and finding, with the reasons therefor, are found upon pages 86-8 of the Master's report.

XIII.

DEFENDANT'S THIRTEENTH EXCEPTION.
(Bank of the Valley Stock)

The defendant excepts to that portion of the Master's report wherein he ascertains the value as

of January 1, 1861, of the stock held by the State of Virginia in the Bank of the Valley by deducting from the book value of $107.60 per share of said stock five per cent. of its par value to meet the supposed cost of liquidation, thereby reducing the actual value of the stock to $102.60 per share, which reduction (Virginia owning 4839 shares) places the total value of the stock at $496,481.40, instead of $520,676.40, and reduces West Virginia's 23½% interest therein from $122,358.95 to $116,673.12, with a consequent loss to her of $5,685.83.

Said valuation and finding, with the reasons therefor, are found on pages 88-9 of the Master's report.

XIV.

DEFENDANT'S FOURTEENTH EXCEPTION.

(Exchange Bank Stock)

The defendant excepts to that portion of the Master's report wherein he ascertains the value as of January 1, 1861, of the stock held by the State of Virginia in the Exchange Bank by deducting from the book value of $107.20 per share five per cent. of its par value to meet the supposed cost of liquidation, thereby reducing the actual value of the stock to $102.20 per share, which reduction (Virginia owning 8755 shares) places the total value of the stock at $894,761, instead of $938,536, and reduces West Virginia's 23½% interest therein from $220,555.96

to $210,268.83, with a consequent loss to her of $10,287.13.

Said valuation and finding, with the reasons therefor, are found on pages 89-90 of said report.

XV.

DEFENDANT'S FIFTEENTH EXCEPTION.
(Atlantic, Mississippi & Ohio R. R. Co.)

The defendant excepts to that portion of the Master's report wherein he finds that the entire value as of January 1, 1861, of the properties sold by the State of Virginia to the Atlantic, Mississippi & Ohio Railroad Company on December 20, 1870, at the price of $4,000,000, and described in Class F of the supplemental answer, was only $204,688.42, instead of the sum of $4,276,044.39, thereby reducing West Virginia's 23½% interest therein from $1,004,870.43 to $48,101.77, with a consequent loss to her of $956,768.66.

Said finding and the reasons therefor are found on pages 95-8 of the Master's report.

XVI.

DEFENDANT'S SIXTEENTH EXCEPTION.
(Manassas Gap R. R. Stock)

The defendant excepts to that portion of the Master's report wherein he ascertains that the stock owned and held by the State of Virginia in the Manassas Gap Railroad Company on the first day of January, 1861, and of the par value of

$2,105,000, was of no value, instead of finding that it was worth at least par as of that date, thereby denying West Virginia a credit of $494,675.00, being 23½% of said sum.

Said finding, with the reasons therefor, is found upon pages 107-10 of the Master's report.

XVII.

DEFENDANT'S SEVENTEENTH EXCEPTION. (General Exception)

The said defendant further excepts to many other errors apparent upon the face of said report, and prays that said exceptions, and each of them, may be considered and sustained.

All of which is respectfully submitted.

A. A. LILLY,
Attorney General.

CHARLES E. HOGG,
JOHN H. HOLT,
Of Counsel for West Virginia.

FILE COPY.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1914.

NO. 2 ORIGINAL.

COMMONWEALTH OF VIRGINIA

vs.) IN EQUITY.

STATE OF WEST VIRGINIA.

BRIEF FOR WEST VIRGINIA UPON EXCEPTIONS TO THE MASTER'S REPORT AND UPON THE SUBJECT OF INTEREST.

A. A. LILLY,
Attorney General,
CHAS. E. HOGG,
JOHN H. HOLT,
Associate Counsel for
West Virginia.

April 19, 1915.

TABLE OF CONTENTS.

Introduction 1- 2

Discussion of Virginia's Exception No. 1 3-10

" " " " No. 2 10-11

" " " " No. 3 11-21

" " " " No. 4 21-23

" " " " No. 5 24-27

Discussion of Bondholders' Exception No. 1 27-28

" " " " No. 2 28

" " " " No. 3 28-29

" " " " No. 4 29

" " " " Nos. 5, 6, 7, 8 and 9 30

" " " " No. 10 30

" " " " No. 11 30-31

" " " " No. 12 31-33

Discussion of W. Va.'s Exception No. 1 33-34

" " " " " No. 2 34-36

" " " " " No. 3 36-37

" " " " " No. 4 37-38

" " " " " No. 5 39

" " " " " No. 6 39-40

" " " " " No. 7 40-43

" " " " " No. 9 47-48

" " " " " No. 10 48-49

Discussion of W. Va.'s Exceptions Nos. 11, 12, 13 and 14 50-51
" " " " " No. 15 51-53
" " " " " No. 16 53
" " " " " No. 17 53-55
West Virginia's Equities in Virginia's Assets 55-58
Interest 59-80
Equitable reasons why W. Va. should pay no interest 59-63
Other circumstances showing interest charge against W. Va. to be inequitable 63-66
Legal reasons why W. Va. should pay no interest 66-80
I. Claim of Va. against W. Va. unliquidated 66-68
II. No promise on part of W. Va. to pay interest 68-71
III. W. Va. not chargeable with interest as damages 71-72
IV. Unearned interest no part of public debt of Va. existing prior to January 1, 1861 73-80
Conclusion 80
Addendum 81

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1914.

NO. 2 ORIGINAL.

COMMONWEALTH OF VIRGINIA

vs.) IN EQUITY.

STATE OF WEST VIRGINIA.

BRIEF FOR WEST VIRGINIA UPON EXCEPTIONS TO THE MASTER'S REPORT AND UPON THE SUBJECT OF INTEREST.

The State of Virginia and her bondholders contended before the Master that the securities set up in the supplemental answer of the State of West Virginia (23½% of the value of which, as contended by West Virginia, should be credited to her in reduction of her liability upon her proportion of the "public debt") should be valued as of June 20, 1863,

that being the date of West Virginia's admission into the Union as a State, while West Virginia insisted that these stocks, bonds and loans should be valued as of the first day of January, 1861, that being the date as of which the debt to the payment of which she was to contribute was to be ascertained.

The Master held with West Virginia, and valued the securities in question as of January 1, 1861 (Master's report, page 10), and he placed a total value thereon as of that date of $14,511,945.74 (Master's report, page 115). He then ascertained that 23½% of that total was $3,410,307.25, and that that amount should be "credited to West Virginia in reduction of her liability upon her proportion of the 'public debt' " (Master's report, page 116). But he further found that West Virginia has received stocks in various companies of the total value of $541,467.76, which amount he subtracted from the $3,410,307.25, leaving a net credit to West Virginia of $2,868,839.49 to be applied upon her proportion of the principal of the public debt of Virginia (Master's report, page 116).

Virginia has excepted to the finding of the Master that the securities set up in the supplemental answer of the defendant should be valued as of January 1, 1861, instead of June 20, 1863, and further excepted to his report upon the ground that his valuations, even as of that date, upon some of the securities involved, are too high. West Virginia, upon the other hand, has excepted upon the ground that he has placed a valuation too low upon many of these securities.

This cause comes on now finally to be heard upon the exceptations of the State of Virginia and of the

bondholders to the report of the Special Master filed in this cause on the 22nd day of January, 1915, as well as upon the exceptions of the State of West Virginia to said report, and upon the subject of interest, and these subjects will be briefly argued in their order.

We will first take the exceptions of the State of Virginia.

VIRGINIA'S EXCEPTION NO. 1.

The first exception of Virginia is her most important one, and is addressed to and complains of the finding of the Master wherein he values the assets in question as of January 1, 1861, instead of as of June 20, 1863, and it is asserted that such finding is erroneous for the following reasons:

"Because:

(1) There was no such agreement as the Master has assumed;

(2) There is no warrant for such a construction found in the terms of the contract of separation between the two States, and,

(3) The finding and conclusion of the Master are in conflict with the decision of this Court rendered March 6, 1911, whereby the Court adopted as the mode of arriving at the equitable proportion of the principal of the debt to be paid by the defendant the comparative value of the real and personal property of the two States *at the date of separation, June 20, 1863.*"

With respect to the first ground of objection, it is based upon the following statement of the Master:

> "The only right that West Virginia acquired as to these assets or investments as against Virginia was the right to require Virginia, on the date agreed upon, to apply the assets or investments, at their fair value at the time agreed upon, towards the liquidation of her own debt, so that West Virginia could know, when the assets were so applied, the amount of the real debt remaining to which she would be obliged to contribute. It was perfectly competent for the two States to agree upon any date upon which the debt and the value of the assets and the investments, and the difference between the two, could be ascertained. West Virginia's rights do not depend upon any title that she acquired to assets solely owned by Virginia, as to which she did not and could not acquire any title,but they do depend upon the agreement of Virginia to account for these assets or investments, at their fair value upon the date when the amount of the debt is to be ascertained. This is an absolute protection to West Virginia, as Virginia cannot recover any portion of the debt of West Virginia until those assets are thus accounted for and applied. This construction is, in my judgment, plain, clear, simple, equitable, just, and completely and adequately protects every legal and equitable right of both of the parties thereto.
>
> It is my conclusion, therefore, that the assets are to be valued as of January 1, 1861."
>
> (Master's Report, page 10)

The terms of the agreement between the two States are measured by Section 8 of Article 8 of the Constitution of 1861 of the State of West Virginia, upon the faith of which she was admitted into the Union through the enabling Act of Congress, and with the consent of the State of Virginia; and, while the contract does not in express terms mention these assets, or any of them, yet the date as of which the debt was to be ascertained to the payment of which West Virginia was to contribute was named and expressly fixed. It was January 1, 1861, and necessarily, whatever credits were to be applied thereto must be applied as of that date. The amount of the debt could not otherwise be ascertained. With a bonded indebtedness outstanding and a sinking fund in existence applicable to its discharge, the real debt to be apportioned could not be ascertained as of January 1, 1861, without first applying the sinking fund and striking the balance. The promise of West Virginia was to assume "an equitable proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, in the year one thousand, eight hundred and sixty-one", and it could not be ascertained what the debt was as of that date without applying the credits existing at that time; and the credits could not be then applied (consisting of stocks) without valuing them as of that date.

Under such circumstances, two courses were open, each leading to the same result; that is to say, the debit column could be added, followed by an addition of the credit column, and, after the latter amount had been subtracted from the former, 23½%

of the result could be taken and set down as West Virginia's equitable proportion of the principal of the debt; or, as is now being done, after the total indebtedness has been ascertained, regardless of credits, and 23½% thereof taken, the credits are ascertained and aggregated, and 23½% thereof taken and deducted from the already ascertained 23½% of the debt, again arriving at West Virginia's equitable proportion of the principal of the debt.

The last method is pursued for the reason that, at the time of the ascertainment by this Court of West Virginia's equitable proportion of the principal of the Virginia debt, there was no evidence before it of the existence of any credits in her behalf, or of the value of any assets on hand; and, upon the bringing to the attention of this Court by supplemental answer of the fact that credits in the form of securities of value were in reality in existence on January 1, 1861, and which had never been applied, this Court reopened and re-referred the cause, in order that their actual value might be ascertained, and to the end that equity might be done.

With respect to the second ground of objection to the finding of the Master, that the assets should be valued as of January 1, 1861, instead of June 20, 1863, viz., that "there is no warrant for such a construction found in the terms of the contract of separation between the two States", it is enough to say that West Virginia's *equitable* proportion of the debt could not be ascertained in any other way. The debt existed January 1, 1861, and the credits applicable thereto were likewise then in existence; that is to say, Virginia then owned all the securities set up in the supplemental answer of the defendant, and consist-

ing of stocks, bonds and loans, and these assets, as shown by her unbroken line of legislation in relation thereto, had been intended for and devoted to the payment of her public debt. If they had been acquired subsequent to 1861, or if, having been acquired prior to that date, had been disposed of before that time, they would not and could not constitute credits as of that date; but, being then on hand, and being then of great value, how in equity could the debit side of the account be added and the credit side postponed until some later day, when the items constituting it had been either greatly depreciated or utterly destroyed in value? The bonds representing the debt were valued as of January 1, 1861,—why not the stocks and loans representing the credits applicable thereto as between Virginia and West Virginia? Suppose, instead of taking the bonds of Virginia representing her debt in existence January 1, 1861, at par, for the purpose of ascertaining the total of such indebtedness, their actual market value had been taken for that purpose on June 20, 1863, as Virginia would now have us take the securities representing credits, what would have been the total indebtedness to be apportioned between the two States? It would have been the par of the bonds measured in Confederate currency, which, when reduced to a gold basis, would have brought the debt to be apportioned to a mininum.

When West Virginia promised to assume an equitable proportion of the Virginia debt as it existed prior to the first day of January, 1861, the then living members of her Constitutional Convention may be supposed to have known that Virginia owned

at that very time assets applicable to its reduction or discharge of the then value of many millions of dollars, and she must have made her promise in the light of that fact, and could have meant nothing else by the use of the word **equitable** than a just proportion of the balance of the debt after the then value of the assets on hand had been deducted therefrom. This supposition may be indulged in the light of the testimony that has been taken before the Master upon the present reference, although the existence and value of these assets had since been lost sight of in the lapse of time, and in consequence of the fact that the records thereof were lodged with Virginia, and were not to be found in the archives of the State of West Virginia. If there had been no promise on the part of West Virginia, Virginia would have taken the benefit of all the assets and property, and would have paid the whole debt; and, when West Virginia assumed an equitable proportion of the debt, she could be assumed to have had nothing in mind except the application of those assets to the debt before the apportionment of the latter between her and the State of Virginia.

With respect to the third ground of objection to the finding in favor of January 1, 1861, it is contended that such a conclusion is "in conflict with the decision of this Court rendered March 6, 1911, whereby the Court adopted as the mode of arriving at the equitable proportion of the principal of the debt to be paid by the defendant the comparative value of the real and personal property of the two States *at the date of separation, June 20, 1863.*" But there is no conflict here. The two conclusions relate to

entirely different subject-matters. The one relates to the ascertainment of the debt to be apportioned, and the other fixes the ratio of apportionment after the debt has been ascertained. The finding of the Master relates simply to the ascertainment of the debt, while the ruling of this Court referred to establishes the equitable basis of apportionment between the two States of the debt so ascertained.

Virginia contended before the Master for June 20, 1863, for other reasons than those now embodied in her exceptions, and may repeat them in argument here; so it may not be amiss to notice them by way of anticipation. One of her main contentions was that the assets could not be valued as of January 1, 1861, because West Virginia had not become a State at that time; that she had not then been born, and that in this, the year of our Lord 1915, she could not get the benefit as credits of the prenatal values of 1861; but, in the very next breath, she complacently announced that West Virginia could be saddled with the prenatal debts of 1861; and it would seem to us that, if she were enough of an entity to be charged with a debt created prior to her admission into the Union, she was likewise enough of an entity to receive a credit thereon existing at the date of the creation of the debt, although that may have been prior to her admission as a State. Whoever has a capacity to be charged has a like capacity to be credited. Under the circumstances of this case, the admission of West Virginia into the Union has nothing in the world to do with the question; for, after she has become a State, she may be charged with any obligation imposed as a condition

to her admission into the Union, and may be credited with any amount necessary to make that obligation equitable in accordance with the terms of the condition. In other words, the obligation in the one case and the credit in the other spring out of circumstances existing prior to the creation of West Virginia, but the judgment charging her with the one and crediting her with the other is not entered until after she has become a State.

The reason why Virginia seeks to have the value of these assets moved forward from the first day of January, 1861, to the 20th day of June, 1863, is because the latter date would bring them within the influence of the ravages of war, and measure their value by the unspeakable standard of Confederate currency. To establish such a date would not only violate the rules of bookkeeping, which require that, in striking a balance, the credits and debits must be taken as of the same date, but would impair and practically destroy the equities of West Virginia, which constitute the basis of her promise, and would likewise enable the State of Virginia to take advantage of her own wrong, because it was largely through her efforts in conventions assembled, and upon the field of battle, that these securities were impaired.

VIRGINIA'S EXCEPTION No. 2.

Virginia's second exception is to the failure of the Master to fix June 20, 1863, as the date as of which the assets in question should be valued, as her first exception was addressed to the fact that he did find January 1, 1861, to be the proper date, and

what has been said in response to exception No. 1 is applicable by way of reply to exception No. 2, and need not be here repeated.

VIRGINIA'S EXCEPTION No. 3.

The third exception of Virginia relates to the values placed by the Master upon the stocks owned by the State of Virginia in the Richmond, Fredericksburg & Potomac Railroad Company, the Orange & Alexandria Railroad Company, the Richmond & Danville Railroad Company, the Richmond & Petersburg Railroad Company and the Virginia Central Railroad Company, and to the method by which he ascertained these values as of January 1, 1861.

The contention is that he relied solely upon book values, "disregarding other and competent evidence" and taking no account whatever "of the depreciation and necessary cost of renewal of the physical properties of said Companies".

It will be necessary to notice the findings of the Master with respect to the various companies separately.

RICHMOND, FREDERICKSBURG & POTOMAC RAILROAD CO.

Contrary to the statement in the exception, the Master did not value the stock held by the State of Virginia in this Company upon the first day of January, 1861, "solely" by its book value, which he should have done under the circumstances of this case according to our contention, as will be seen when we come to discuss the exceptions filed by the State of

West Virginia to the Master's report. On the contrary, he averaged the book value and the alleged earning value of the stock. The book value on January 1, 1861, was $150.04 per share (the par being $100), and the earning value (based solely upon dividends declared) was $84.83 per share. These two values were added together, making $234.87, and the half thereof taken, placing the actual value per share as found by the Master at $117.43. The number of shares then owned by Virginia was 2,752, and the total value thereof at $117.43 per share was placed by the Master at $323,167.36. He did ignore the alleged market quotations on this stock, because they were not dependable (Master's report, pages 32-4).

The attack by Virginia upon this finding is in effect two-fold, first, because he relied upon book value, and, secondly, because he ignored market quotations, and, in order that the reliability of the one and the worthlessness of the other might be seen, it will be necessary to examine the evidence upon these two subjects, and, having done so in the case of this particular road, it will be unnecessary to again notice them thus in detail when we come to a discussion of the value of the stocks in the other railroad companies embraced in this exception.

BOOK VALUE.

The book value of this Company (Richmond, Fredericksburg & Potomac Railroad Company) was arrived at by taking its balance sheets, and thereby ascertaining the surplus of its assets over its liabilities, and calculating the consequent premium upon its stock. The schedule or exhibit in relation thereto

is Defendant's Exhibit No. 2, consisting of the main exhibit with four sub-sheets or supporting exhibits, and is found upon pages 2-12 of the printed exhibits. Sub-sheet one (printed exhibits, page 4) shows the trial balance of this road for the year ending March 31, 1859, and discloses a surplus of $461,134.54, and a consequent book value of its stock as of that date of $144.20 per share. Sub-sheet 2 (printed exhibits, page 6) shows its trial balance for the year ending March 31, 1860, and discloses a surplus of $505,403.22, and a consequent book value of its stock upon that date of $148.40 per share. Sub-sheet 3 (printed exhibits, page 8) gives the trial balance for the year ending March 31, 1861, and discloses a surplus of $562,819.05, and a consequent book value of its stock upon that date of $150.40 per share. Sub-sheet 4 (printed exhibits, page 10) covers the trial balance for the year ending March 31, 1862, showing a surplus of $656,577.85, and a consequent book value of the stock upon that date of $157.40 per share.

From these calculations it will be seen that the increase in the book value of the stock for the year ending March 31, 1861, over the year preceding was 2%, but this overruns January 1, 1861, by one-fourth of a year; so that, in order to get the book value for January 1, 1861, instead of March 31, 1861, three-fourths of said 2%, or 1½%, should be added to the book value of March 31, 1860, of $148.40, making a book value for the first day of January, 1861, of $149.90, or, as the schedule puts it, of $150 per share.

These exhibits were based upon the records in the second auditor's office of the State of Virginia, and upon the annual reports of the Richmond, Fred-

ericksburg & Potomac Railroad Company on file in the office of its treasurer in the City of Richmond, and both the main and the underlying exhibits were checked by Mr. Potter, accountant for the State of Virginia, and announced by him to be correct.

Under such circumstances, the book value was dependable, and, if it had been solely followed, as charged by Virginia, the resulting value of the stock would have been correct. The book value at least makes a *prima facie* case, and, in the absence of proof to the contrary, must establish the actual value of the stock. Where the books of a company are accurately and properly kept; that is to say, where its assets and liabilities are properly invoiced and set down, the book value of its stock must be its actual value; and it must be borne in mind in this case that not a single item contained in any balance sheet of this company was attacked by the State of Virginia, either upon the credit or the debit side; but she contented herself (outside of alleged market quotations) with trying to establish June 20, 1863, instead of January 1, 1861, as the date as of which the value of this stock should be ascertained.

The books and balance sheets of the Richmond, Fredericksburg & Potomac Railroad Company are *prima facie* correct.

L. & N. R. Co. v. Hart (Ky.), 75 S. W., 289.
Wilson v. Potter, 42 S. W., 836; 19 Ky. Law Rep., 988.
Lambert v. Griffith, 44 Mich., 65; 6 N. W., 106.
Budeke v. Ratterman, 2 Tenn. Chy., 459.
Stuart v. McKichan, 74 Ill., 122.

The actual value of stocks may be shown by a comparison of the assets and liabilities of the company issuing them.

Julia v. Critchfield, 147 Fed., 65.
Nelson v. First Nat'l Bank, 69 Fed., 798.
Henry v. North Am. etc. Co., 158 Fed., 79.
Butler v. Wright, 103 N. Y. App. Div., 463.
Cabbel v. Cabbel, 111 N. Y. App. Div., 426.
Vonau v. Magenheimer, 126 N. Y. App. Div., 257; 196 N. Y., 510.
Leurey v. Bank of Baton Rouge, 58 So. Rep., 1022 (La.).
Beaty v. Johnson, 66 Ark., 529.
McDonald v. Danahy, 196 Ill., 133.
Greer v. Lafayette County Bank, 128 Mo., 559.
State v. Carpenter, 51 Ohio State, 83.
White v. Jouett, 147 Ky., 197.
Moffitt v. Hereford, 132 Mo., 513; 34 S. W., 252.
Brinkerhoff-Farris Co. v. Lmbr. Co., 118 Mo., 461; 24 S. W., 129.
Tevis v. Ryan (Ariz.), 108 Pac., 461.
Felker v. Ryman (Tex. Civ. App.), 135 S. W., 1128.
Milwaukee Trust Co. v. City of Milwaukee (Wis.), 138 N. W., 707.

MARKET QUOTATIONS.

The alleged market quotations upon the stock of this company were properly ignored by the Master (Master's report, pages 32-4). They appear as plaintiff's revised exhibit No. 2 (New Record, Vol. 2, page 334), and are compiled from the Richmond Dispatch of various dates from November 2, 1860,

to August 12, 1863. There was no stock exchange in the City of Richmond at that time (New Record, Vol. 1, page 877). They are reported by Lancaster & Son, and, while this firm of brokers may have been a reputable one, and while the Richmond Dispatch may have been a reputable newspaper of general circulation in Richmond during this period, yet the alleged quotations show no "bids" or "offers" during the whole period; that is to say, from the second of November, 1860, to the twelfth of August, 1863, and show only four sales, one on November 2, 1860, another upon November 9 of the same year, a third upon the 27th of May, 1863, and a fourth upon the twelfth day of August, 1863. In other words, no sales are shown between November 9, 1860, and May 27, 1863; and the four sales that are shown in no instance give the number of shares disposed of, or tell us whether the sales were public or private, for cash or upon credit. The sale may have been of one share, and may not have been made under such circumtances as to afford competition to purchasers or buyers. Notwithstanding these facts, the quotations ran along in a separate column, with the statement that they were based upon the last sales, and with nothing to show the date of such last sales. Under such circumstances, even if they met the requirements of the law, there is nothing to show that they fell upon or near the date in question, viz., January 1, 1861.

In addition to the foregoing, it appears that the firm making these reports (Lancaster & Son), according to the testimony of Mr. Williams, a member thereof, based its quotations so furnished to the Richmond Dispatch solely upon its own transactions

although there were other brokers at the same time engaged in the City of Richmond in the same business. In other words, if they were to sell today a share of stock in the Richmond & Danville Railroad Company at seventy-five cents, their next market quotation would be made at that price, regardless of sales made by other brokers upon the same day of the same issue of stock. It appears that they neither knew nor cared in publishing these reports whether other brokers were selling the same stocks at a less or at a greater price; and how it would be possible to make up market quotations in such a way it is difficult to see. One broker might sell at ninety cents, another upon the same day might sell the same stock at ninety-five cents, and a third at one dollar. How either price could be arbitrarily taken as representing the market price it is difficult to understand. That such was the practice of Lancaster & Son appears from the testimony of Mr. John L. Williams (New Record, Vol. 3, pages 127-8, cross questions and answers 68-73).

Such quotations do not meet the requirements of the law, and were properly repudiated by the Master.

Whelan v. Lynch, 60 N. Y., 474.
N. & W. Ry. Co. v. Reeves, 97 Fed., 284.
Wigmore on Evidence, Vol. 3, Sec. 1704.
Fairley v. Smith, 87 N. C., 367; 42 Am. Rep., 522.
Jones v. Ortel (Md.), 78 Atl., 1030.
Mr. Vernon Brewing Co. v. Terschner, 108 Md., 158; 68 Atl., 702.
St. Louis etc. R. Co. v. Pearce (Ark.), 101 S. W., 760.

Bullard v. Stewart (Tex. Civ. App,), 102 S. W., 174.
Meriwether v. Quincy etc. R. Co., 128 Mo. App., 674; 107 S. W., 434 & 439.
Wilber v. Buckingham (Iowa), 132 N. W., 960.

With respect to the criticism of Virginia upon the use of book value as a standard for determining actual values, because it does not take into account "the depreciation and necessary cost of renewal of the physical properties" of the companies involved, it will be sufficient in the case of the Richmond, Fredericksburg & Potomac Railroad Company to call attention to defendant's Exhibit No. 15 (New Record, Vol. 1, page 753), which, at the request of the Master, was furnished by the defendant for the purpose of throwing light upon the character of the balance sheet of the Richmond, Fredericksburg & Potomac R. R. Company, wherein, among other things, it is said—

> "The cost is carried forward carefully year to year, generally under classified headings, such as 'Engineering', 'Grading', 'Bridges', etc., and contains no items that are not legitimate.
>
> They have a yearly report by directors as to general conditions of road, and, in almost every instance, they report on roadway and rolling stock, and the report is always in excellent condition, showing that the repairs and renewals had taken care to keep the road in good condition.
>
> In addition to this, we have the following items of 'extraordinary' expense charged to operating expenses, which ex-

tra expenses were additional items of cost of road and equipment."

These items then follow, continuing to the bottom of page 754, where an aggregate of $132,843.93 is shown to have been devoted to improvements and charged to operating expenses, thus showing, as stated by the Master at page 33 of his report, "a conservative policy as to depreciation".

The book value of this stock was, therefore, properly relied upon by the Master, and its alleged market quotations were properly ignored by him. How he improperly applied the earning power of the company as affecting the value of its stock we will undertake to show when we come to discuss the exceptions of West Virginia.

ORANGE & ALEXANDRIA R. R. CO.
RICHMOND & DANVILLE R. R. CO.
RICHMOND & PETERSBURG R. R. CO.
VIRGINIA CENTRAL RAILROAD COMPANY.

We find that the book value as of January 1, 1861, of the Orange & Alexandria Railroad Company, the Richmond & Danville, the Richmond & Petersburg and the Virginia Central Railroad Companies was ascertained by taking the last balance sheet of these roads obtainable, viz., September 30, 1856, and ascertaining therefrom the surplus on hand at that time, and, from the reports of said companies to the State of Virginia, the profits for the years 1857, 1858, 1859, 1860 and 1861, which were added to the surplus, and the book value of the stock was derived therefrom (New Record, Vol. 2, page 14,

defendant's exhibit No. 3, asset 1; asset 2, page 19; asset 3, page 22, and asset 4, page 24).

The book value of the stock of the Orange & Alexandria Railroad Company on January 1, 1861, was thus ascertained to be $53.32 per share (the par per share being $50), which was averaged with the earning value of $12.28 per share, and its supposed actual value thereby arrived at of $32.80 per share (Master's report, pages 36-8). There were no market quotations in the case of this stock, and the fallacy of averaging the book value with the supposed earning value will be discussed when we come to the exceptions of West Virginia.

The book value of the Richmond & Danville was ascertained to be $137.37 per share (the par being $100 per share), and this was taken by the Master as the actual value of the stock, less 5% of its par for liquidation purposes, or $132.37 per share. Market quotations he ignored for the reasons given in the case of the Richmond, Fredericksburg & Potomac Railroad Company. In this case he did, as charged by Virginia, rely "solely" upon the book value of the stock; but, as we shall contend upon the exceptions of West Virginia hereinafter noticed, he erroneously deducted from this book value 5% of the par of the stock for liquidation purposes, because no such liquidation, or the expense thereof, was called for or involved.

The par value of the Richmond & Petersburg Railroad Company was $100 per share, and its book value was ascertained for the year 1860 to be $121.86, which was averaged by the Master with the alleged earning value of $106.95 per share, making a value

per share of $114.40 (Master's report, pages 42-4). Market quotations were ignored for the reasons given in the case of the Richmond, Fredericksburg & Potomac Railroad Company.

The par value per share of the Virginia Central Railroad Company was $100, and the Master, as in the case of the Richmond & Petersburg Railroad Company, ascertained the value thereof by averaging its book value of $131.16 per share with its earning value of $116.95, making a value of $124.05 per share as of January 1, 1861 (Master's report, pages 45-6). Market quotations were ignored for the reasons hereinbefore given, and the fallacy of reducing the book value per share by averaging the same with its alleged earning value will be hereinafter considered.

VIRGINIA'S EXCEPTION No. 4.

This exception is taken to the finding of the Master upon an item of $149,984, being the value fixed by him as of January 1, 1861, of a dividend bond issued by the Richmond, Fredericksburg & Potomac Railroad Company, and owned by the State of Virginia. The ground of exception is that it was paid off in Confederate currency, which, when reduced to a gold basis, amounted to only $19,111.11, and that Virginia, having received only that amount for the bond in lawful money, should be charged upon that basis, and West Virginia credited with 23½% of that amount, instead of 23½% of the face of the bond (defendant's exhibit No. 3, asset 19, New Record, Vol. 2, page 44; also plaintiff's exhibit No. 3, New Record, Vol. 2, page 363).

The first of these exhibits shows that Virginia owned this bond on and prior to the first day of January, 1861, and that the principal thereof was paid, $27,520 on the 13th day of March, 1863, and $122,464 on the first day of July, 1863, making $149,984. This, of course, was in Confederate currency, and the second exhibit shows that the value of that currency at that time was $19,111.11; but the question is not what the bond was worth in 1863, but what its value was on the first day of January, 1861. Neither does the fact that Virginia accepted a depreciated currency in its settlement, or a less amount than its real value, affect the actual value of the bond, or the size of the credit that West Virginia should receive on account thereof.

In the first place, the presumption is that a bond, whatever the rule may be with respect to stock, is worth par.

Henry v. North Am. Construction Co., 158 Fed., 79 (C. C. A. 8 Cir., Nov. 29, 1907).
Appeal of Harris, 12 Atl. Rep., 743.
Brinkerhoff-Farris Co. v. Home Lmbr. Co., 118 Mo., 447.
2 Clark & Marshall on Corporations, page 1170.
3 Sutherland on Damages (3 ed.), page 1921.

In the next place, as we have seen, the book value of the stock of the Richmond, Fredericksburg & Potomac Railroad Company, the obligor in the bond, on January 1, 1861, was at a premium, being worth $150 per share, and it was at that time paying 7% annual dividends, and its dividend bond in question must at least have been worth par, the value put

upon it by the Master; and the Master gives a conclusive reason for this valuation. He says "the Richmond, Fredericksburg & Potomac Railroad Company was operated at a profit, and was able to pay on January 1, 1861. I allow $149,984" (Master's report, page 73).

Some effort was made before the Master, and may be repeated here, to show that the defendant, in its supplemental answer, only claimed a credit as to some of these stocks at least based not upon their actual value as of January 1, 1861, but upon the amount received by the State of Virginia on the subsequent sales thereof. It is true that at more places than one in the supplemental answer the prices received by Virginia for these various stocks were mentioned, but such mention was only made as a part of the history of the transaction, and not for the purpose of furnishing a standard for the measurement of their value, or the measurement of West Virginia's credits on account thereof. On the contrary, the real contention of the defendant, as set forth in its supplemental answer, is contained in the following allegation:

> "That this defendant was interested in said assets to the extent of her just proportion of the value thereof as of the first day of January, 1861, and was the equitable owner of and entitled to receive out of the proceeds thereof, according to the basis of liability fixed by this Honorable Court, 23½% of the sum of $20,810,357.98, and the whole of $225,078.06 collected by Virginia from West Virginia Counties, as aforesaid, making an aggregate of $5,115,512.19."
>
> (Supplemental Answer, page 15.)

VIRGINIA'S EXCEPTION No. 5.

This is addressed to the valuation placed by the Master upon the stock of the State of Virginia in the James River & Kanawha Company. Virginia owned $10,400,000 at par of the stock of this company, and the Master valued it as of January 1, 1861, at $1,664,333 (Master's report, pages 100-6). The ground of the exception is twofold: First, because the finding is in conflict with the Master's former report, and, secondly, because it is alleged that said company was, to all practical intents and purposes, insolvent on and after the first day of January, 1861.

The holdings of the State in this company ($10,400,000) constituted 91.77% of its entire capital stock (New Record, page 1467). The company was likewise indebted to the State in the sum of $7,560,214.44 (New Record, page 1147), and, during the year 1860, its net earnings, after deducting operating expenses, amounted to $151,000.14 (New Record, page 1436). This, however, was not sufficient to pay the interest on its indebtedness, and, in consequence, it ran behind. However, by an Act of the General Assembly of the State of Virginia passed on the 23rd day of March, 1860 (New Record, Vol. 2, page 67), the State exchanged the debts held by her against the company for 74,000 shares of its 6% preferred stock, and thereafter the preferred stock of the company was in a condition to receive, in the shape of dividends, the net earnings over and above operating expenses in lieu of interest on its debt. In other words, the whole of the $151,000 net income per annum would be applied to the 6% preferred stock of the State, and this $151,000, capitalized at

6%, would give a value to said preferred stock of $2,516,666. The fact that the State only owned 91.77% of the capital stock would make no difference under such circumstances, because its stock was preferred, and was in sufficient amount to consume all of the net earnings, so that the 91.77% of the preferred stock owned by the State in reality represented the whole stock, and would take the entire value of $2,516,666; but the Master has only valued this stock at $1,664,333, instead of $2,516,666; that is to say, he has underestimated it to the extent of $852,333; and West Virginia now excepts to his finding in this particular, and requests that his report be corrected so as to give this additional value.

The Master arrives at his result by taking the average net receipts above operating expenses for a period of twenty-five years, which he finds to be $111,800 per annum, from which he deducts $11,940, being the annual interest on an indebtedness owed by the Company of $199,000, leaving a balance of $99,860, which he captilizes at 6% giving him the valuation aforesaid of $1,664,333 (Master's report, page 105).

Why should the average annual net earnings from 1835 down to and including the year 1860 (a period of twenty-five years) be taken, instead of the actual net receipts of $151,000.14 accruing above operating expenses during the year 1860, for the purpose of ascertaining the value of the stock of the Company in 1860?

There seem to have been two companies, the James River Company, which owned and operated the canal east of the Alleghany Mountains, and the

James River & Kanawha Company, which represented a steamboat connection on the Kanawha River west of the Alleghany Mountains, and the two were merged in the year 1835 under the name of the latter, the property of the former being put into the merger or amalgamation at the price of $1,350,000. The part of the property west of the Alleghanies represented still less capital, and its property consisted of little more than winged dams at certain shoals in the Kanawha River. It will be seen, therefore, that the James River & Kanawha Company was a small affair, representing little capital and small property in the year 1835, the period when the Master's average net earnings begin. It did not at that time own the docks in the City of Richmond. These were acquired in 1855 (New Record, Vol. 1, page 744), and only a small portion of its canal was then completed and in operation. Afterwards, millions of capital were added by the State, and the canal was completed and put into operation to Buchanan, a distance of one hundred and ninety-five miles, with a branch or extention from Balcony Falls to Lexington, Virginia, a distance of twenty-two miles, making a total length of 217 miles (New Record, Vol. 1, page 727); and, when the averaging period was ended; that is to say, in 1860, and on January 1, 1861, it was a fully completed and equipped canal, with water-ways, locks, dams and towpath, two hundred and seventeen miles in length, and it owned, in addition to this, very valuable docks and water powers in the City of Richmond, and really the James River front from Seventh Street, in said City, to Twenty-eighth Street (New Record, Vol. 1, page 741). Be-

sides, its tonnage for the year 1842, and it was presumably greater then than in 1835, was only 112,707 tons, as compared with a tonnage in 1860 of 244,273 tons, the volume of business in the latter year being more than double that of the former (New Record, Vol. 3, page 50-a).

The fact that the Company, after its rehabilitation under the Act of March 23, 1860, by the exchange of the Company's bonds held by the State for its preferred stock, ran behind again, showing a deficit in the year 1861 of $69,809.54, in the year 1862 of $46,609.86, and in the year 1863 of $129,036.25, and that it had accumulated an indebtedness of $1,877,912.83 at the time the whole of its property was turned over to the Richmond & Alleghany Railroad Company on March 4, 1880, pursuant to an Act of the General Assembly of Virginia passed April 2, 1879 (New Record, Vol. 2, page 206, exhibit 7-e; page 208, exhibit 7-g), makes no difference, because this indebtedness accrued during a period of nineteen years subsequent to the date as of which the stock of the Company should be valued, and must be attributed in a large measure to the operation of the canal during the Civil War.

BONDHOLDERS' EXCEPTION NO. 1.

The first exception filed by the bondholding creditors of Virginia relates to the date as of which the assets presented in the supplemental answer of the defendant should be valued, and objects to the conclusion and finding of the Master wherein he fixes January 1, 1861, as the proper date for that purpose, instead of June 20, 1863. The exception is identical

with Virginia's first exception, and the reply in both cases would be the same, and need not be repeated here.

BONDHOLDERS' EXCEPTION NO. 2.

This exception is the same as No. 2 presented by the State of Virginia, and complains of the failure of the Master to find that June 20, 1863, was the proper date as of which the assets should have been valued. It is for all practical purpose the same as exception No. 1, and what has been heretofore said in reply to the first exception of Virginia is an answer to her second exception, as well as an answer to the first and second exceptions of the bondholding creditors.

BONDHOLDERS' EXCEPTION NO. 3.

This exception is brief, and it is in the following language:

> "The bondholding creditors of Virginia respectfully except to the failure of the Master to conclude or hold that the assets are not to be valued in excess of the price or amount that Virginia received therefor."

A sacrificial sale made by Virginia at a subsequent time would furnish no evidence of the value of these assets as of January 1, 1861. Neither would a subsequent sale at their then actual value, they having depreciated in the meantime through the instrumentalities of the War, furnish any such evi-

dence, and certainly, if given away by Virginia, as in the case of the property and stock of the James River & Kanawha Compay, twenty-one years after the date fixed by the West Virginia Constitution as the time for the valuation of these securities, could not weigh a feather's weight in ascertaining their value as of the time when they should have been valued. It may likewise be suggested that the squandering of a trust fund by a trustee, either through improvident sales of the subject matter of the trust or by unwarranted donations thereof, could not be permitted to influence the subject of actual values. If a trustee could be compelled to account only for that which he receives, the greater the misfeasance the less the liability would be, and a monumental premium would be placed upon fraud.

BONDHOLDERS' EXCEPTION NO. 4.

This exception, although somewhat different in verbiage from No. 3, is not distinguishable therefrom in principle. The one complains of the "failure of the Master to conclude or hold that the assets are not to be valued in excess of the price or amount that Virginia received therefor", and the other complains of the "failure of the Master to conclude or hold that Virginia should not be charged with a value for the assets in excess of the price or amount that Virginia received therefor", and may be treated as involving identically the same question, and the answer to the one is the answer to the other.

BONDHOLDERS' EXCEPTIONS Nos. 5, 6, 7, 8 & 9.

These exceptions are identical with the third exception of the State of Virginia, and relate to the findings of the Master of the value of the stocks of the Richmond, Fredericksburg & Potomac, the Orange & Alexandria, the Richmond & Danville, the Richmond & Petersburg and the Virginia Central Railroad Companies. Virginia embodied these findings in one exception (No. 3), while the bondholding creditors make a distinct exception in each case (Nos. 5, 6, 7, 8 & 9). The grounds of exception are the same, and the reply thereto need not be here gone over again.

BONDHOLDERS' EXCEPTION NO. 10.

This is the same as Virginia's exception No. 4, and excepts to the valuation of $149,984 placed by the Master as of January 1, 1861, upon a dividend bond issued by the Richmond, Fredericksburg & Potomac Railroad Company, and then owned by the State of Virginia.

The book value of the stock of this Railroad Company at that time was $150 per share (par $100). It was then declaring 7% dividends, was being operated, as found by the Master, at a profit, and was able to pay its bond; and the same was worth at least its par, if nothing more.

BONDHOLDERS' EXCEPTION NO. 11.

This is taken to the finding of the Master in the case of the James River & Kanawha Canal Company.

It is the same as Virginia's fifth exception, and need be discussed no further than to say that the record (Vol. 3, page 1436) shows that the Canal Company, for the fiscal year ending September 30, 1860, received net, above operating expenses, $151,000.14, which, capitalized at 6% would produce $2,516,666, or $852,333 more than the Master allowed; and his finding, instead of being diminished, should be increased by that amount; and West Virginia excepts to his finding for that reason and to that extent.

See defendant's supplemental exhibit 2, New Record, Vol. 3, pages 1434-7; also New Record, pages 1428-9. *

BONDHOLDERS' EXCEPTION NO. 12.

The exception criticizes the failure of the Master to find that Virginia had the right to apply the assets set down in the defendant's supplemental answer, first, "to the payment of $1,451,492.01 of the debt of the undivided Commonwealth of Virginia owing on January 1, 1861, and subsequently paid by Virginia at like cost to her, which debt was not included in the bonded debt of the undivided Commonwealth of Virginia"; secondly, "to the payment of $12,693,807.32 of interest on the bonded debt of the

---

* NOTE: The new record consists of three volumes. The first is paged from 1 to 1076, inclusive; the second consists of the plaintiff's and defendant's exhibits, and is paged from 1 to 443, inclusive, while the third is a continuation of the paging of the first, beginning with page 1077, and continuing to page 1633, inclusive.

undivided Commonwealth of Virginia accrued since January 1, 1861, and paid by Virginia at a cost to her on a gold basis of $10,436,101.19", and, thirdly, "to the payment of the further sum of $2,218,319.81 for interest after January 1, 1872, on bonds issued by the present State of Virginia in exchange for the old unfunded bonds of the undivided State, for which Virginia issued her bonds in full", making a total claim of this character of $14,105,913.01.

With respect to the first amount ($1,451,492.01), it was excluded by the opinion and finding of this Court of March 6, 1911, from the indebtedness of Virginia as it was found to exist prior to January 1, 1861 (Virginia v. W. Va., 220 U. S., page 1). It was not a part of the public debt of the undivided Commonwealth of Virginia within the meaning of Section 8 of Article 8 of the West Virginia Constitution of 1861; and, even if it had been, nearly 11/12 of the items that go to make up the amount, as shown by the plaintiff's exhibits, were paid between the first day of January, 1861, and the 20th day of June, 1863, during which period West Virginia was still a part of the Commonwealth of Virginia, and presumably contributed her due proportion to such payments. The exhibit relied upon by the plaintiff is plaintiff's supplementary exhibit No. 1, with its four sub-schedules (New Record, Vol. 2, pages 289-95). The payments embraced in sub-schedules one (page 290) show no debt at all. The payments in sub-schedule two (page 291) bear no date, but, as they show the various quarters when the amounts represented by them fell due, may be presumed to have been made at maturity, and, if so, they were all made between January 1, 1861, and June 20, 1863, except

the last five, aggregating $33,575.76. In the same way the payments set down in sub-schedules three (pages 292-3) appear all to have been made between January 1, 1861, and June 20, 1863, except the last nine, aggregating $69,370.95. The same is true with respect to all the payments embraced in sub-schedule four (pages 294-5), except the last fifteen, aggregating $18,765, making a total of $121,711.71 paid after June 20, 1863, as against the claim of Virginia of $1,451,492.01. In other words, taking even the contention of Virginia, her claim is eleven times too great.

The second item ($12,693,807.32, or $10,436,101.19, when reduced to a gold basis) and the third item ($2,218,319.81) both represent alleged interest payments by Virginia, the one being of interest accruing since January 1, 1861, upon the bonded debt of the undivided Commonwealth, and the other of interest accruing after January 1, 1872, on bonds issued by the present State of Virginia in exchange for the old unfunded bonds of the undivided State. The question here involved, therefore, is in reality whether or not West Virginia should be charged with interest upon her equitable proportion of the principal of the public debt of Virginia, and, as that will be made the subject of separate discussion, the exception need not be further noticed here.

WEST VIRGINIA'S EXCEPTION NO. 1

This exception of the State of West Virginia is addressed to the expression of opinion by the Master, found at the bottom of page ten and the top of page eleven of his report, that West Virginia is liable for

interest beginning with the first day of January, 1861, and its discussion is reserved until that portion of the brief wherein the subject of interest is hereinafter exclusively dealt with.

WEST VIRGINIA'S EXCEPTION NO. 2.

(Richmond, Fredericksburg & Potomac R. R. Stock)

Virginia, on the first day of January, 1861, owned 2,752 shares of stock in the Richmond, Fredericksburg & Potomac R. R. Company, of the par value of $100 per share, making a total par value of $275,200. The book value of the stock per share at that time was $150, making a total actual value of $412,800 (New Record, Vol. 2, pages 2-12,, being defendant's exhibit No. 2, with its sub-sheets 1, 2, 3 & 4). The Master, however, instead of taking the undisputed and uncriticized book value as the actual value of the stock, averaged the book value per share ($150) with the alleged earning value per share of the stock ($84.83), and ascertained the actual value as of January 1, 1861, to be $117.43 per share.

This was erroneous, for the following reasons:

First: Because he improperly ascertained the so-called earning value of the stock. He averaged the dividends declared thereon for a period of eleven years, ending with the year 1860, and found that the average dividend per year during that period was 5.09%, which when capitalized at 6%, gave him his alleged earning value of $84.83 per share. If he had taken the average dividends for the fifteen years set forth in defendant's exhibit No. 2 (New Record, Vol.

2, pages 2 & 3), he would have found that the same were nearly 7% per year instead of 5.09%; and, if he had taken the dividend declared in the year in question, that is to say, in 1860, and in the year preceding, that is to say, in 1859, he would have found that it was actually 7% in each year, and this, capitalized at 6%, would have produced a value per share of $116.66 2/3, instead of $84.83, as declared by him to be the earning value of the stock, which, when averaged with the book value of $150 per share would have made quite a difference;

Second: Because such an average in either event would have been wrong, for the reason that the book value, as shown by defendant's exhibit No. 2 (New Record, Vol. 2, pages 2-12), was ascertained by the surplus of assets over liabilities left after all dividends had been declared. The surplus in the case of this Company after the declaration of dividends for the year ending March 31, 1859, as shown by its balance sheet for that year, was $461,184.54 (New Record, Vol. 2, pages 4 & 5); for the year ending March 31, 1860, $505,403.22 (New Record, Vol. 2, pages 6 & 7); for the year ending March 31 1861, $562,819.05 (New Record, Vol. 2, pages 8 & 9), and for the year ending March 31, 1862, $656,577.85 (New Record, Vol. 2, pages 10-12).

To average dividend values with book values under such circumstances would be practically to add the dividends in the liability column twice;

Third: Because some companies may be in a condition to declare large dividends, but they may, notwithstanding this fact, declare small ones, or none at all, choosing rather to put all their net earnings to surplus. In such case, the dividends would furnish

no or small evidence of the actual value of the stock, and,

Fourth: Because the book value of stock represents its actual value, where the books are correctly kept; and, in the case of this Company, not a single item, either in the asset or the liability column, in any of its balance sheets for 1859, 1860, 1861 or 1862, has been criticized or called in question by the State of Virginia, with the result that, presumtively, at least, its books have been correctly kept, and its stock values actually shown.

The Master should, therefore, under the circumstances of this case, have taken the book value of $150 per share alone, which would have given to the 2,752 shares owned by the State of Virginia on January 1, 1861, a total value of $412,800, instead of $323,167.36, making a difference in the valuation of this stock as of that date of $89,632.64, 23½% of which, or $21,063.68, represents the loss to West Virginia.

WEST VIRGINIA'S EXCEPTION NO. 3.

(Orange & Alexandria R. R. Stock)

Virginia owned of the stock of this Company on January 1, 1861, 17,490 shares, of the par value of $50 per share, making an aggregate par value of $874,500. The book value of this stock as of that date was $53.32 per share (New Record, Vol. 2, defendant's exhibit 3, page 13; defendant's exhibit 3, asset 1, page 14). This book value was ascertained by taking the last balance sheet of the Company, viz., September 30, 1856, and ascertaining therefrom the

surplus on hand at that time, and from the reports of said Company to the State of Virginia the profits for the years 1857, 1858, 1859 1860 and 1861, which were added to the surplus and the book value of the stock derived therefrom. All dividends paid upon this stock were subtracted before the surplus was ascertained, and the alleged earning power of the stock, under such circumstances, could not be taken as a standard for the measurement of its value. On the contrary, and for the reasons set forth in the next preceding exception (Richmond, Fredericksburg & Potomac R. R. Co.), its book value should have been taken alone, instead of averaging the book value, as the Master did, with the alleged earning value. The Master ascertained the earning value to be $12.28 per share (Master's report, page 38), which, when added to the book value of $53.32 per share, makes $65.60, one-half of which, or $32.80, he ascertained to be the actual value per share. This amount, multiplied by the number of shares (17,490), gave as the total value of the stock, according to the finding of the Master, $573,672.00. If the book value alone had been used, the result would have been $932,566.80, representing an increase of value over the Master's finding of $358,894.80, 23½% of which, or $84,340.27, represents the loss to West Virginia.

WEST VIRGINIA'S EXCEPTION NO. 4.

(Richmond & Danville R. R. Stock)

Virginia owned 12,000 shares, of the par value of $100 per share, of the stock of the Richmond & Danville Railroad Company, making a total at par

of $1,200,000. The book value, ascertained as in the case of the Orange & Alexandria Railroad Company, on the first day of January, 1861, was $137.37 per share (New Record, Vol. 2, defendant's exhibit 3, asset 2, page 19). Besides, this stock, for the six years preceding January 1, 1861, earned an average profit of 9%, and a profit of 11% for the year 1860; but this time the Master did not average the earning value of the stock with its book value, but took the book value alone, which we feel to be right; but it is respectfully submitted that he erred in deducting from the book value of $137.37 per share 5% of its par value for liquidation purposes, thereby reducing the value of a share to $132.37, which, when multiplied by the total number of shares (12,000) produced $1,588,440.00, or the amount of his allowance (Master's report, page 41).

This 5% reduction amounts to $60,000, and 23½% thereof represents a loss of $14,100 to West Virginia.

Why should 5% of the par of this stock be deducted from its actual value? It was not going through liquidation, and there were no liquidation expenses. Neither was it being transferred from or to Virginia, and there could be no transfer expenses. Virginia owned the stock on the first day of January, 1861, and continued to own it thereafter. The stock was simply being appraised as of that date, and its true value as of that time measured the credit upon the debt to which it was applicable, and it was not subject to any such deduction as if it were passing through a bankruptcy or chancery court.

WEST VIRGINIA'S EXCEPTION NO. 5.

(Richmond & Petersburg R. R. Stock)

The par of this stock was $100 per share, and Virginia owned upon the date in question 3,856 shares, of a total par value of $385,600. The book value, ascertained as in the case of the Orange & Alexandria and the Richmond & Danville R. R. Companies, was, on January 1, 1861, $121.86 per share (New Record, Vol. 2, defendant exhibit 3, asset 3, page 22). Again the Master averaged this with its alleged earning value, arriving at a value thereby per share of $114.40, which, when multiplied by the number of shares, gives his allowance of $441,126.40.

If the book value alone had been used, and it should have been for the reasons given in the case of the Richmond, Fredericksburg & Potomac R. R. Company (West Virginia's exception No. 2), the result would have been a total value for this stock as of January 1, 1861, of $469,892.16, making a difference of $28,765.76, 23½% of which, or $6,759.95, represents West Virginia's loss.

WEST VIRGINIA'S EXCEPTION NO. 6.

(Virginia Central R. R. Stock)

The holding of Virginia of this stock on January 1, 1861, was 18,916.70 shares, of the par value of $100 each, or a total of $1,891,670.68. Its book value, ascertained as in the case of the other rail-

roads, was $131.16 per share (New Record, Vol. 2, defendant's exhibit 3, page 13, and defendant's exhibit 3, asset 4, page 24). The earning value, based upon such dividends as were declared, was ascertained by the Master to be $116.95 per share (Master's report, page 46), and he bases his finding upon a combination of the two, the average being $124.05 per share, giving a total value for all the shares of $2,390,918.08, instead of a value of $2,481,115.26, had he relied upon the book value alone, as he should have done under the circumstances. This represents a loss of $90,197.18 on the entire valuation of the stock, 23½% of which, or $21,196.34, being the diminution of West Virginia's credit.

WEST VIRGINIA'S EXCEPTION NO. 7.

(Alexandria, Loudon & Hampshire R. R. Stock)

This road was incorporated in 1853 (Master's report, 48), and between that date and January 1, 1861, a period of seven years, Virginia had expended in the purchase of its stock in cash, $993,248, the whole of which she still owned on that date.

Between January 1, 1861, and April 16, 1862, she spent $24,000 more in the purchase of this stock, making a total as of the latter date of $1,017.248.

On November 25, 1867, she sold all of her holdings to the Road itself at $5.00 a share, or for the price of $50,862.40; but West Virginia was interested only in that part of the stock sold that was owned by Virginia on January 1, 1861. The amount so then owned seems to have been 97.64% of the whole stock sold, and, therefore, $49,662.05 of the sale price would

be attributed to that portion of the stock held January 1, 1861; provided the amount received by Virginia in 1867 for this stock could be taken as a standard for the measure of its value on January 1, 1861, or could be considered as an element in fixing such value.

The Master so valued the stock; that is to say, he measured its value as of January 1, 1861, by its sale price on November 25, 1867; or, worse than that, he took such sum as its value on January 1, 1861, ($35,096.85) as would produce $49,662.05 by November 25, 1867, the latter sum being the sale price on the latter date for that proportion of the stock that was owned by Virginia on January 1, 1861 (Master's report, 48-9).

Even under ordinary circumstances, the sale price would furnish no evidence of the value of a chattel or security, especially seven years after the date as of which it was to be valued; but, when we reflect that West Virginia's interest in this asset must be determined as of a date before the Civil War had begun, and that the Master has put a value upon it based upon a sale price after the country through which the road runs had been harried by a four years war, we begin to see the utter worthlessness of the standard adopted. It must be borne in mind that this road, beginning at Alexandria, Virginia, ran northwest through that State by way of Leesburg, practically parallel to the Potomac River, with Bull Run hard by upon the one side, and within sound of the Federal guns at Washington, upon the other; and, if we are to believe the history of the times, to which counsel for the State of Virginia ap-

pealed so persistently before the Master, the railroads of the South, at the close of the war, were in such a physical condition as to render them practically worthless. We are told that their embankments were gone, cuts filled, and that now and then even rails were removed and wrapped around trees.

What value, then, should be given to this stock as of January 1, 1861? It must be confessed that the evidence upon the subject is meager. We have no evidence of the declaration of dividends, and little knowledge of the physical condition of the road. All we know is that it was incorporated in 1853, and, during the seven years next following, was completed and put into operation from Alexandria, Virginia, to Leesburg, in that State (see map, New Record, Vol. 2, page 283); that the par of its stock was $100 per share, and that, between 1853 and the first day of January, 1861, it bought at par, and paid therefor in cash 9,932.48 of its shares (New Record, Vol. 2, defendant's exhibit 3, asset 6, page 28).

We have, then, the presumption (in the absence of evidence to the contrary) that its stock was worth par, strengthened by the fact that Virginia paid par therefor in cash. This, to say the least, furnishes much stronger evidence of its actual value than does a mere sale price at the end of a destructive war.

If, therefore, it should be valued in this way, instead of by the standard fixed by the Master, the result would be that the total stock was worth on the first day of January, 1861, the sum of $993,248, instead of the sum of $35,096.85, as found by the Master, and 23½% would give West Virginia a credit of $223,413.28, instead of $8,247.74.

The reason why the Master, as shown by his report (pages 48-9) found the value he did, instead of the one here contended for, was because the expert accountant for the State of West Virginia, in defendant's exhibit No. 3, asset 6 (New Record, Vol. 2, page 28), only placed a value upon this stock of $49,662.05, making the mistake of valuing it according to the subsequent purchase price received by Virginia, instead of according to our contention. His exhibits, however, gave all the facts, and his mistake was one of law, rather than of fact; and, almost in the same breath, attention was called to the fact by counsel for the State of West Virginia, and the proper claim based upon the exhibit was made (New Record, Vol. 1, page 416).

WEST VIRGINIA'S EXCEPTION No. 8.

(Virginia & Tennessee R. R. Loan)

On the first day of January, 1861, the Virginia & Tennessee Railroad was a completed line in operation from Lynchburg, in the State of Virginia, to Bristol, in the State of Tennessee, a distance of about two hundred miles (see map, New Record, Vol. 2, page 283).

The stock of this company was fully paid up (Master's report, 51).

Virginia owned therein stock of all classes amounting to $2,300,000 (New Record, Vol. 2, page 167).

No evidence was introduced to show that any dividends were paid on this stock prior to June 20, 1863; but a schedule was introduced for the purpose

of showing dividends paid to the State of Virginia thereon after the separation of the two States, and it appears therefrom that she received as dividends thereon on March 26, 1864, $100,000, and on April first of the same year $38,000, making an aggregate of $138,000, which would be 6% upon the par of her stock of $2,300,000 (New Record, Vol. 2, page 227); but the Master says of this fact that "one dividend of about one-half of one per cent. was paid in 1864, the only dividend for nearly thirty years" (Master's report, 51). By what warrant a dividend of 6% can be turned into one of one-half of one per cent. we are at a loss to understand.

The book value of this stock on June 30, 1860, was $99.90 per share, the par per share being $100.00 (New Record, Vol. 2, defendant's exhibit 6-a, page 57).

By virtue of an Act of the General Assembly of Virginia passed February 9, 1853, a loan of $1,000,000 was authorized to be made by the Board of Public Works to this road for and on behalf of the Commonwealth of Virginia, which loan was made during the same year, and secured by a mortgage upon the property of the company, executed on March 26, 1853 (New Record, Vol. 2, plaintiff's exhibit 19, page 423). This loan remained unpaid on the first day of January, 1861, and was still owned by the State of Virginia, at which time interest had accumulated thereon to the amount of $280,000, making a total of principal and interest of $1,280,000 (New Record, Vol. 2, defendant's exhibit 3, asset 8, sheet 1, page 30).

And, during the Civil War, there was paid into the treasury of the State of Virginia in Confederate

currency to the credit of this loan $886,685. These payments were made in the following amounts, and upon the following dates:

June 19, 1863	$200,000
June 30, 1863	300,000
Aug. 6, 1863	100,000
Aug. 7, 1863	100,000
Sep. 11, 1863	186,685
Making a total of	$886,685

(New Record, Vol. 2, defendant's exhibit 3, page 31.)

These payments the Board of Public Works for the State of Virginia undertook to repudiate by resolution passed on February 4, 1868, upon the ground, among others, that it was paid to the Second Auditor of Virginia, and that that officer had no right or power to receive the same (New Record, Vol. 1, pages 420-2); but it appears that the law of Virginia at that time was that a warrant for these payments could be obtained from the Second Auditor as well as from the Auditor of Public Accounts (Act of Virginia of 1860, Chap. 45, page 266, Sec. 2; Master's Report, 51).

Afterwards, that is to say, on December 22, 1870, Virginia sold whatever interest she had left remaining in this loan, together with her stock in this company and stock in certain other railways, and her interest in certain other loans, to the Atlantic, Mississippi & Ohio Railroad Company, at the price of $4,000,000, secured by a second mortgage upon the property of the purchasing company (New Record, Vol. 2, defendant's exhibit 6, page 56; Vol. 1, page 425).

West Virginia, in her schedules filed before the Master, should have claimed a value for this loan as of January 1, 1861, of $1,280,000, that being the principal with accumulated interest as of that date; but, instead, she only claimed $886,685, that being the amount paid thereon to Virginia, as hereinbefore set forth (New Record, Vol. 2, defendant's exhibit 3, page 13); and with this valuation she would have been satisfied, but the Master, taking her at her minimum claim, and because that amount was paid to Virginia thereon in Confederate currency during the war, reduced the same to a gold basis as of the dates upon which the payments were made, with the result that he places a total value upon this loan as of January 1, 1861, of only $84,799.90, instead of $886,685. 23½% of the latter amount would be $208,370.97, and of the former only $19,927.97, resulting in a loss of West Virginia of $188,443.

As a matter of fact, transactions in Confederate currency in 1863 can furnish no standard of value for this loan as of January 1, 1861, before the war began, and before Confederate currency was known. At the true date as of which it should be valued (1861), West Virginia was interested in the principal loan of $1,000,000, with accumulated interest to the extent of $280,000, the loan evidenced by bonds secured by a mortgage upon a growing railroad, the evidence further showing that the entire stock of the company had been paid up, and that its stock was worth almost par. Under such circumstances, a *prima facie* case of par value for the bonds evidencing the loan would be made, and, in the absence of evidence introduced by the State of Virginia to

the contrary, should prevail. At least a discount and reduction from $1,280,000 to $886,685 should not be disturbed because forsooth the loan was subsequently paid off in part in Confederate currency.

WEST VIRGINIA'S EXCEPTION No. 9.

(Norfolk & Petersburg R. R. Loan)

Prior to January 1, 1861, the State of Virginia loaned to the Norfolk & Petersburg Railroad Company $300,000, and this loan was still unpaid on that date (New Record, Vol. 2, page 12-a).

$68,500 of the principal of this loan was paid to Virginia in the year 1867, and, in the year 1868, $68,500, making a total payment upon the principal of $137,000. This was paid in Virginia bonds. Other payments were made, but presumably upon interest (Master's Report, 57; New Rec., Vol. 2, page 34). This left a balance of principal of $163,000, as shown by the books of Virginia; and this balance was subsequently sold by the State, along with other stocks and loans, on December 22, 1870, to the Atlantic, Mississippi & Ohio Railroad Company for the price of $4,000,000, secured by a second mortgage upon the property of the vendee company. The various stocks and loans in this sale were all listed, and the amount thereof in dollars and cents set down in the memorandum of sale made by Virginia to the Atlantic, Mississippi & Ohio Railroad Company (New Rec., Vol. 2, page 56), except the balance of the loan of $1,000,000 made to the Virginia & Tennessee Railroad Company, upon which the State had received $886,685, as seen in the discussion of our exception

No. 8, and whatever interest Virginia might still have in a loan of $800,000 made by her to the Southside Railroad Company, to which loan the Master has given no value (Master's Rep., 53-4), and to which finding we have filed no exception. The total values so placed upon these stocks by the State of Virginia in the schedule referred to amount to $4,689,436.41, for which she accepted $4,000,000, as aforesaid, or about 85% of the schedule price; and 85% of $163,000 (that being the unpaid balance on the loan to the Norfolk & Petersburg Railroad Company) would amount to $138,550, which, when added to the $137,000 already paid in Virginia bonds upon the principal of the loan, would aggregate $275,550, giving to the loan a value, if it is to be measured by what Virginia received therefor, of said last named amount. The Master, however, contents himself with the $137,000 paid in bonds, and reduces that to $98,607.09, as representing the present value as of January 1, 1861, of $68,500 in 1867, and the same amount in 1868.

WEST VIRGINIA'S EXCEPTION NO. 10.

(U. S. Government Loan)

The State of Virginia advanced moneys to the Government of the United States during the war of '12. The money was returned, however, and the Government of the United States always contended that it had been settled in full, but the State of Virginia claimed that there was a balance of interest due on the first day of July, 1814, amounting to $298,369.74, and finally, by an Act of Congress passed

in the year 1902, the claim of Virginia was recognized, and a settlement was had between the two governments as of February 11, 1894, wherein the Federal Government turned over and surrendered to the State of Virginia bonds of that State, and allowed Virginia interest on her claim from July 1, 1814, to February 11, 1894, a period of 79 years, 7 months and 10 days, and amounting to $1,425,212.79, which, when added to the alleged principal of $298,369.74, made a total of $1,723,582.53. The principal sum, with the interest thereon from July 1, 1814, to January 1, 1861 (46 years and 6 months), amounted to $832,451.57, or a total of principal and interest as of that date of $1,130,821.31 (New Rec., Vol. 2, page 41). In other words, this asset, principal and interest, was worth on January 1, 1861, the sum of $1,130,821.31, and why West Virginia was not interested in it to the extent of 23½%, it is difficult to perceive. It may be that the final settlement between Virginia and the Federal Government was put upon an arbitrary basis, as suggested by the Master (Master's Rep., 67-70), but an equity of some kind existed prior to January 1, 1861, that was subsequently recognized by the Government of the United States, and Virginia profited by it. It was just as much West Virginia's equity as it was Virginia's, and, although it may have stood on a narrow basis, and was subsequently closed by the Federal Government in a liberal way, yet it had its foundation in a claim that existed prior to January 1, 1861, and whatever came out of it to Virginia must, in equity, be shared with West Virginia.

WEST VIRGINIA'S EXCEPTIONS Nos. 11, 12, 13 & 14.

(Farmer's Bank of Virginia Stock)
(Bank of Virginia Stock)
(Bank of the Valley Stock)
(Exchange Bank Stock)

The exception to the valuation placed by the Master upon the stock in each of these Banks is the same, and they will be discussed together.

He took the book value of the stock in each Bank as of January 1, 1861, but, instead of multiplying that book value by the number of shares held and owned by the State of Virginia in the particular Bank, and thus arriving at its total actual value, he took the book value per share, and deducted therefrom 5% of the par value of a share for liquidation purposes.

The book value per share of the stock in the Farmer's Bank of Virginia was $107.89, and he reduced the same to $102.89 per share by deducting 5% of its par, thereby placing a total value upon the shares held by the State of Virginia in this Bank of $990,419.14, instead of $1,038,549.14 (**Master's Rep.**, 85-6).

The book value of the stock per share in the Bank of Virginia was $74.99, and it was reduced in the same way to $71.49 per share, which resulted in a total value of Virginia's stock in this Bank of $984,131.34, instead of $1,091,312.34 (Master's Rep., 86-8).

The book value of the stock of the Bank of the Valley was $107.6 per share, but this the Master re-

duced in the same way to $102.6 per share, resulting in a total valuation of $496,481.40, instead of $520,676.40 (Master's Rep., 88-9).

The book value of the stock of the Exchange Bank per share was $107.2, which was reduced by the Master in the same way to $102.2 per share, resulting in a total valuation of $894,761, instead of $938,536 (Master's Rep., 89-90).

This stock was owned by Virginia on the first day of January, 1861, and she continued to own it. No transfer was necessary to put the title thereto in her; neither were these Banks, or any of them, going through a process of liquidation, and the $5.00 deducted from the book value of each share was purely an arbitrary discount that was required for no legitimate purpose, and performed no function, except to diminish the value of the stock below its real worth.

The balance sheets of these Banks will be found in New Record, Vol. 2, pages 48-52.

WEST VIRGINIA'S EXCEPTION NO. 15.

(Atlantic, Mississippi & Ohio R. R. Co.)

On the first day of January, 1861, the State of Virginia owned numerous shares of stock in the Norfolk & Petersburg, South Side, Virginia & Tennessee and Virginia & Kentucky Railroad Companies.

The book value per share at that time of the Norfolk & Petersburg was $89.52; the South Side $105.98; the Virginia & Tennessee $99.90, and the Virginia & Kentucky $100, and the total value of Virginia's holdings, measured by the book value,

was $4,276,044.39 (New Rec.,Vol. 2, defendant's exhibit 6-a, page 57).

Virginia still owned these stocks in the month of December, 1870, at which time she sold them, along with certain loans she had made these Companies, to the Atlantic, Mississippi & Ohio Railroad Company for the lump sum of $4,000,000, payable in eight installments of $500,000 each, and took a second mortgage upon the property of the Railroad Company to secure the payment of the same (New Rec., Vol. 2, defendant's exhibit 6, page 56); but never realized anything out of the transaction but the sum of $500,000, which she received in the year 1882 (New Rec., Vol. 2, pages 165-7).

The Master placed a value on these stocks as of January 1, 1861, of only $204,688.42 (Master's Rep., 98), which value was arrived at by apportioning the $500,000 among the stocks of the four railroad companies in the ratio of 10 2/3% to each, making an aggregate of $464,642.72, which, when calculated back to January 1, 1861, gave a present value of $204,688.42.

The $500,000 received in the year 1882 for these stocks, twenty-one years after the date as of which they should have been valued, furnishes little, if any, evidence of their value as of January 1, 1861. It would be more just and equitable to have taken the value placed upon them in the year 1870, both by the seller and by the purchaser; that is to say, by the State of Virginia and the Atlantic, Mississippi & Ohio Railroad Company. This was only nine years after January 1, 1861, and the price then named ($4,000,000) represented the judgment of both the

seller and the purchaser as to the value of the stock; or it would have been more accurate still to have gone back to the proper date itself, January 1, 1861, and place a value on these stocks, as shown by the books of the Company, of $4,276,044.39.

WEST VIRGINIA'S EXCEPTION NO. 16.

(Manassas Gap R. R. Stock)

The Master gives no value to this stock. The entire capital was $3,322,164.67, $3,188,312.97 of which had been paid up in 1860. Virginia owned $2,105,000 of this stock at par (New Rec., Vol. 2, page 61).

Virginia's stock was fully paid up, and, on January 1, 1861, the road was constructed and in operation from Manassas to Mt. Jackson via Strasburg, and it was in process of construction from Mt. Jackson to Harrisonburg, Virginia (testimony of J. K. Anderson, New Rec., Vol. 1, page 724-6). Par was paid for this stock by the State of Virginia, and it represented an actual railroad in operation. It was not shown to have any debts, and, under such circumstances, in the absence of evidence to the contrary, this stock was worth *prima facie* par.

WEST VIRGINIA'S EXCEPTION NO. 17.

(General Exceptions)

A.

It appears that certain Counties in West Virginia, after the latter State had been organized, that is to say, after June 20, 1863, paid taxes, fines,

etc. to the State of Virginia to the amount of $224,799.63 (New Rec., Vol. 2, defendant's exhibit 10, page 224). $44,535.18 of this amount seems to have been assessed prior to June 20, 1863, while the residue, $180,264.45, was assessed after that time (New Rec., Vol. 1, page 608).

The Master disallowed this item, for the following reason: He says "no part of this sum, $180,264.45, was paid by West Virginia, directly or indirectly. Payment of this sum in taxes by individual taxpayers creates no right in West Virginia to recover the amount of Virginia * * * * *" (Master's Rep., 113). We do not understand that these taxes were paid by individual taxpayers living in West Virginia Counties to sheriffs and collectors of adjoining Counties in Virginia, but that these taxes were collected by West Virginia officials and turned over by them to the State of Virginia; and, if this be true, the whole money, in consequence, was covered into the treasury of Virginia, although she had no interest therein or title to the same, or to any part of it, and should be compelled to account for the whole thereof unto the State of West Virginia.

B.

The Master likewise charges us with having received from the restored government of Virginia $170,771.46, with which he charges us (Master's Rep., 116). This consisted of money paid by Governor Pierpont, of the restored government of Virginia, to Governor Boreman, of West Virginia, but it had been collected, as appears from the record, from West Virginia territory, and she should not in equity

be charged with it as if it had been raised from Virginia territory.

WEST VIRGINIA'S EQUITY IN THE VIRGINIA ASSETS.

If the division of the old Commonwealth of Virginia into two States had taken place without any agreement upon the part of the State of West Virginia to assume an equitable proportion of the pre-existing debt, out of analogy to the rule that obtains in the division of municipalities, Virginia would have taken all the property originally owned by the old Commonwealth, excepting the physical property actually situated within the new State, and would have become responsible for the entire debt.

Dillon Mun. Corp., Vol. 1, Sec. 188, page 216 (3 ed.).
Mt. Pleasant v. Beckwith, 100 U. S., 514; 25 L. Ed., 699.
Comrs. of Laramie County v. Comrs. of Albany County, 92 U. S., 307; 23 L. Ed., 552.

The text of Dillon above cited is as follows:

"So it has been frequently held that, if a new corporation is created out of the territory of an old corporation, or if part of its territory or inhabitants is annexed to another corporation, unless some provision is made in the Act respecting the property and existing liabilities of the old corporation,

> the latter will be entitled to all the property and be solely answerable for all the liabilities."

Likewise, the first point of the syllabus in the case of Mt. Pleasant v. Beckwith, *supra*, reads as follows:

> "Where a new town is formed from portions of an old one, the old corporation owns all the public property within its new limits, and is responsible for all the debts of the corporation contracted before the Act of separation was passed, unless the legislature otherwise provide."
> (Syl. L. Ed.)

And the second point of the syllabus in the case of Laramie County v. Albany County, *supra*, reads:

> "Where the legislature does not prescribe any different regulations, the rule is that the old corporation owns all the public property within its new limits, and is responsible for all debts contracted by it before the Act of separation was passed, which debts it must pay without any claim for contribution from the new sub-division."
> (Syl. L. Ed.)

But, as further said by Dillon,

> "Upon the division of the old corporation and the creation of a new corporation out of part of its inhabitants and territory, or upon the annexation of part to another corporation, *the legislature may provide* for

an *equitable appropriation or division* of the property, and impose upon the new corporation, or upon the people and territory thus disannexed the obligation to pay an equitable proportion of the corporate debts."

(Dillon Mun. Cor. Sec. 189, Vol. 1, page 216; 3 ed.)

It will be seen, therefore, that, under such circumstances, an *equitable division* of the property and the *payment of an equitable proportion of the* debts go hand in hand, and it becomes quite evident that, when West Virginia promised to assume "an equitable proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, in the year one thousand, eight hundred and sixty-one", she meant that she should receive a like equitable proportion of the property owned by the old Commonwealth. In other words, and under the rule, if she paid no part of the debt, she should receive no part of the property; but if, upon the other hand, she should pay an equitable proportion of the debt, she should receive an equitable proportion of the property.

In the next place, it is stipulated in this case, and is a fact, that the stocks, securities and other properties presented in this case by West Virginia for valuation, to the end that the same proportion of such valuation may be applied as a credit upon her part of the debt as her part of the debt bears to the whole debt, were actually purchased out of the proceeds of the very bonds that evidence the debt to the payment of which she is compelled to contribute (New Record, Vol. 1, page 711); and it fol-

lows as a corollary that, if she is compelled to pay any part of a debt representing purchase money, she is entitled to receive a corresponding part of the value of the thing purchased.

Again the assets in question here were devoted by the Legislature of Virginia to the payment of her public debt, and the same have, in consequence, become trust funds.

Act of Gen. Assembly of Va. of 1838, new Rec., Vol. 1, p. 661-4.
Sections 28, 29 & 30, Art. 4, Constitution of Va. 1851, New Rec., Vol. 1, p. 651.
Act of Va. passed March 26, 1853, New Rec. Vol. 1, p. 652-6.
Act of Gen. Assembly of Va., approved March 31, 1875, New Rec., Vol. 1, p. 656-8.
Joint Resolution of Gen. Assembly of Va. of 1866, New Rec., Vol. 1, p. 705-6.
Resolution concerning Canal Co., New Rec., Vol. 2, p. 198-9.
Sec. 1 of an Act. of Gen. Assembly of Va., approved Feb. 18, 1870, New Rec., Vol. 1, p. 706.
Message of Gov. Letcher of Va., New Rec., Vol. 1, p. 665-6.
Message of Gov. Walker of Va., New Rec., Vol. 1, p. 667-73.

And, in the last place, the Supreme Court having held that West Virginia is compelled to pay 23½% of the debt, West Virginia should receive 23½% of the value of the assets.

Virginia v. West Virginia, 220 U. S., p. 1; 55 L. Ed., 358.

INTEREST.

EQUITABLE REASONS WHY WEST VIRGINIA SHOULD PAY NO INTEREST.

This is not a suit brought by the State of Virginia against the State of West Virginia upon interest-bearing securities. The suit is not upon bonds at all, —Virginia could not sue herself; but it is based upon a constitutional promise made by West Virginia to Virginia, and not to the bondholders. This promise was to assume an equitable proportion of the public debt of Virginia as it existed prior to January 1, 1861. That public debt was evidenced by interest-bearing bonds, and the question at once arises whether a promise to assume or pay an equitable proportion of an interest-bearing debt constitutes a promise to pay an equitable proportion of the interest accruing on that debt. Can there be an equitable apportionment of an interest-bearing debt without apportioning the interest upon the same basis as the principal? The answer to this question must depend upon the circumstances. What would have been equitable between the two States on January 1, 1861, in consequence of Virginia's subsequent conduct, may not be equitable today. If the State of Virginia, by neglect or arbitrary conduct, has prevented the settlement of this debt, or the ascertainment of its principal, until the interest on West Virginia's proportion thereof should be, if allowed to run from January 1, 1861, four times the principal, so that when a decree should be at last entered it would start with a new principal, composed of the original equitable proportion of the principal and fifty odd years of ac-

cumulated interest thereon, with interest to run upon the whole from the present time until paid, then, and in that event, Virginia would be permitted to profit by her own wrong, and become the beneficiary of her own default.

Let us see what has been the conduct of the two States with respect to the ascertainment of this debt, and answer our question in the light of that conduct. West Virginia has not been at fault, but has been helpless. Virginia, upon the other hand, has been and is, solely responsible for the present status of affairs, and ought not to be permitted to reap millions of interest as a reward for her misconduct.

The equitable proportion of this public debt was a question for decision. The amount had to be ascertained, and it could be done only in one of two ways—either by the agreement of the parties, or by the decree of this Court. West Virginia could not ascertain the amount for herself. Neither was it appropriate for her to sue her creditor. From January 1,1861, to June 20, 1863, she was not a State, and could do nothing. From 1863 to April, 1866, a state of war existed, and she could not negotiate with Virginia. Even had she known what her just proportion of the debt was, and had had the money wherewithal to pay it, she could not have gone to the City of Richmond and covered it into the treasury of Virginia. To have done so would have been an act of treason against the Government of the United States. From the Fall of 1866 down until the 6th day of March, 1871, a suit was pending in this Court that had been instituted by Virginia against West Virginia, wherein the integrity of the latter's domain was attacked, and, until that had been decided, she did not know

her own territorial extent, and upon that territorial extent depended her equitable proportion of this debt. At the very first moment when the opportunity presented itself, she sent a commission to treat with Virginia about this matter. Her commission went to Richmond within a very few days after Mr. Justice Miller had delivered the opinion of this Court in the case of Virginia v. West Virginia, to which reference has been made, and which is reported in 11 Wallace, and there she was met with the statement that Virginia had no commission to treat with her, and that the statute upon which her former commission had been based had been repealed. Thereupon, the West Virginia commissioners went home, after having made a *bona fide* effort in the name of their State to settle this controversy of long standing. During and within fifteen days after the appointment of the West Virginia Commission, the same year (1871), Virginia passed her funding bill, wherein she arbitrarily declared that she owed only 2/3 of this debt, and that West Virginia owed the residue; and, in all her efforts thereafter to negotiate with West Virginia, she made the recognition of that fact upon the part of West Virginia a condition precedent to the negotiation, and there the matter stood until she, for the first time, took proper steps looking to the settlement of this conroversy. She brought this suit in 1906, that is to say, forty-five years after January 1, 1861. She could have brought this suit in 1866 when she brought her first suit against West Virginia, and, indeed, they were so closely related, West Virginia's equitable proportion of this debt being dependent somewhat upon the extent of her territory, that she should have presented this question for set-

tlement then. In other words, there has never been an hour that West Virginia could have done a thing, either through negotiation or by appeal to the courts, and, upon the other hand, there has never been an hour during the whole time when Virginia could not have made her appeal to this Court, and have brought this controversy to a close. She neglected to do it; she postponed her rights; she allowed the matter to sleep, evidence to be lost and complications to set in, and it would not be equitable to permit her, by acts of default and neglect of this character, to multiply the principal of West Virginia's debt fourfold. If by the decree of this Court at this time seven millions, without abatement, should be taken as the part of the principal of this debt that West Virginia should contribute, and interest should be allowed thereon from 1861 until now, the interest, in round numbers, would amount to $23,000,000, which, when added to the seven, would give a new principal of thirty millions, upon which interest would run. In other words, Virginia, by her own delay and default, would be permitted to multiply West Virginia's debt by four.

LACHES.

It may be said that *laches* may not be attributed to the Crown, and that this doctrine cannot be invoked against a sovereign State. We take it, however, that that would depend altogether upon the language of the contract under which the Court was acting at the time, and we find here the word "equitable" used; and, if it would be inequitable to permit such a result in consequence of the helplessness of one

State and the delay of another, then, and in that event, would the principles of *laches* be invoked and applied.

There is another reason why an exception to the rule might be allowed, and it is this: Virginia is acting for the most part here as a trustee for these bondholders, and, while the doctrine of *laches* might not be applicable to a sovereign, if the sovereign were acting in a fiduciary capacity, there is no reason why the doctrine might notwithstanding reach the *cestui que trust.*

It might be suggested that West Virginia should have moved by way of the courts as well as Virginia, and that she would be equally chargeable with *laches* in consequence of her failure so to do; but the doctrine of *laches* is never employed except to defeat a claim, and, as West Virginia had and has no claim against Virginia to enforce, the doctrine could have no application to her, because, if so applied, it would have only one result, and that would be to enable her to entirely escape from the payment of any claim.

OTHER CIRCUMSTANCES SHOWING INTEREST CHARGE AGAINST WEST VIRGINIA TO BE INEQUITABLE.

There are other equitable reasons why West Virginia should not pay interest on her debt to Virginia, except from the time of its ascertainment, even if she should pay any interest from any date. Some of these will now be suggested and briefly outlined, rather than discussed in detail.

First: At the time West Virginia was cut off from Virginia and admitted into the Union as a sep-

arate and independent State, her territory was a wilderness. Almost trackless forests stretched from the Alleghanies to the Ohio. Her lands were uncleared, and in large part were uncultivated. Her minerals, for the most part, were undiscovered, and she had then no mining industries. Her population was sparse, and railroads she had none; neither had she canals. Mountain trails constituted almost her entire means of communication. She had no public buildings, and her State institutions had yet to be provided. She inherited none of these from Virginia, but was under the necessity of providing them one and all for herself, without assistance or contribution from the mother State.

Second: Virginia, upon the other hand, had left within her territory, constructed and equipped out of the common funds of the undivided State, a commodious capitol, with its grounds and libraries; a penitentiary at the City of Richmond; a State asylum at Staunton, and one at Williamsburg, with their respective equipments; and a State university at Charlottesville, established and equipped through the common contributions of the two sections extending over the period of a century, and with an established reputation that was not confined to the South, but extended throughout the Nation, and, in fact, was known throughout the world. All these things West Virginia left behind and Virginia inherited, without making contribution of any kind or character.

Third: In addition to the foregoing institutions, the territory left to Virginia was not only

traversed by public canals, built at the common expense, but was grid-ironed by railways that traversed, developed and enriched her counties, furnishing communication between her citizens, and adding taxable value to her property; and, independently of any stock ownership she may have had therein, the indirect benefit resulting to her remaining territory after the division outweighed by far any direct investment she may have had in these roads. And, when we turn to the map filed in this cause (New Rec., Vol 2, page 283), we find that all the rail and water-ways were left with the old State, and that West Virginia did not have a single foot of canal in operation, and less than twenty miles of railway. Directly and indirectly, Virginia received many millions of value in this way, while West Virginia received practically nothing. Her territory was blank and empty, and, if she were compelled to provide herself, as she was, single-handed and unaided, with public institutions, and make public improvements, and, at the same time, should be compelled to pay interest upon securities issued by Virginia in the establishment and construction of public works, buildings and institutions in which she has no interest at all, she would be paying rather dearly for her right of separation. She would be paying without consideration, and such payment would be inequitable.

Fourth: Virginia herself has not paid one dollar of interest upon one-third of her own debt which has accrued since January 1, 1861. She was relieved from this one-third, together with the interest thereon, by agreement with her creditors, the con-

sideration being that she should turn over to them whatever she might recover on her claim against West Virginia in this suit. Why should West Virginia pay Virginia interest on this third, or any part of it?

LEGAL REASONS WHY WEST VIRGINIA SHOULD PAY NO INTEREST.

I.

CLAIM OF VIRGINIA AGAINST WEST VIRGINIA UNLIQUIDATED.

By the very language of the contract upon which the present suit is based, Virginia's claim against West Virginia is uncertain, indefinite and unliquidated. There has never been an hour since the adoption of the West Virginia Constitution of 1861 that West Virginia knew what portion of the debt of Virginia she should pay. The language of her promise was an "equitable" proportion. The very term indicates the necessity of investigation, evidence, ascertainment and decision. There has never been a time, although her treasury might have been full, that West Virginia could have drawn thereout a definite sum to meet a definite purpose. Whether it was one million, or would be ascertained to be five, she knew not. All she knew was that Virginia had arbitrarily decided her own case, and fixed the amount at one-third. West Virginia knew, however, that this was wrong, and without authority, and could not bind her or relieve Virginia, and she was compelled to go along in this way without knowing on what sum, if interest should be charged, it would be calculated. She had no method or means

by which to stop this accumulation, if forsooth it can accumulate upon unascertained amounts. Had she known upon what principal she was to be charged, she could have negotiated her own bonds and paid Virginia off, leaving her own securities outstanding, and perhaps running only on a rate of interest one-half as great as the rate that is borne by the present bonds of Virginia.

Unliquidated amounts do not bear interest, and it cannot be said that interest follows the principal as the shadow does the substance; for, until the amount is ascertained, there is no principal, and there is no substance.

Redfield v. Ystalyfera Iron Co., 110 U. S., 174; 28 L. Ed., 109.
Stevens v. Phoenix Bridge Co., 139 Fed., 248.
I Sedgwick on Damages (9 ed.), 614.
Barrow v. Reab, 9 How. (U. S.), opinion, p. 371.
Wittenberg v. Mollyneaux, 59 Neb., 200; 80 N. W., 824.
Swanson v. Andrus, 83 Minn., 505; 86 N. W., 465.
Dady v. Condit, 209 Ill., 488; 70 N. E., 1089.
Brownell Imp. Co. v. Critchfield, 197 Ill., 61; 64 N. E., 332.
Excelsior, etc., Co. v. Harde, 181 N. Y., 11; 73 N. E., 494.
Macomber v. Bigelow (Cal.), 58 Pac., 312.
Bright v. James, 35 R. I., 492; 87 Atl., 316.
Bennett v. Fed. C. & C. Co. (W. Va.), 74 S. E., 318.
Courtney v. Stand. Box Co. (Cal. App.), 117 Pac., 778.
16 Am. & Eng. Enc. Law (2 ed.), 1016, citing many cases.

The Virginia authorities upon the subject are:

Auditor of Pub. Accts. v. Dugger & Foley, 3 Leigh (Va.), 241.
Phillips v. Williams, 5 Gratt. (Va.), 258.
M'Connico et al., Exrs. of Holloway, v. Curzen, 2 Call (Va.), 358.
Skipwith v. Clinch, 2 Call (Va.), 253.
Waggoner v. Gray's Admrs., 2 H. & M. (Va.), 603.
Stearns v. Mason, 24 Gratt. (Va.), 484.
Lynchburg v. Amherst County, 115 Va., 600-8.

II.

NO PROMISE ON THE PART OF WEST VIRGINIA TO PAY INTEREST.

It was urged in argument on behalf of West Virginia that, if the Legislature of this State must ascertain the equitable proportion of the debt assumed by the defendant, and this constituted a part of the contract between the two States, the Court was without jurisdiction, and that this part of the contract was binding upon both parties, and that the question of the amount of this debt assumed by West Virginia must be referred to her own Legislature as the sole body to ascertain the extent of West Virginia's liability.

The Court, in answer to this argument, used the following language:

> "But again, it was argued that, if this contract should be found to be what we

> have said, then the determination of a just proportion was left by the Constitution to the Legislature of West Virginia, and that, irrespectively of the words of the instrument, it was only by legislation that a just proportion could be fixed. These arguments do not impress us. The provision in the Constitution of the State of West Virginia that the Legislature shall ascertain the proportion as soon as may be practicable was not intended to undo the contract in the preceding words by making the representative and mouthpiece of one of the parties the sole tribunal for its enforcement. It was simply an exhortation and command from supreme to subordinate authority to perform the promise as soon as might be, and an indication of the way."
> 220 U. S. 1.

It is now beyond discussion that the Court regards the first clause of section 8 of article VIII, Constitution W. Va., as constituting the terms of the contract between the parties to this controversy, and, as this clause makes no mention of interest, it is idle to contend that there is any promise upon the part of West Virginia to pay interest.

To hold a State to the payment of interest upon an obligation which she has contracted there must be an express promise to pay interest. In the absence of such express promise there is no liability for interest.

This is the settled law of this country as announced by the Federal and State Courts.

United States v. North Carolina, 136 U. S., 211, 216, 34 L. ed., 336.

This case was followed in South Dakota v. North Carolina, 192 U. S., 268, 48 L. ed. 448, the Court declining to allow interest on the decree rendered therein.
See also Molineaux v. State, 109 Cal., 378, 50 Am. St. Rep., 49.
Carr v. State, 127 Ind., 204, 22 Am. St. Rep., 624, 11 L. R. A., 370.
Seton v. Hoyt, 34 Or., 266, 75 Am. St. Rep., 641.
Board of Co. Com'rs v. Kaul (Kan.), 96 Pac., 45, 17 L. R. A. (N. S.), 552.

In *Seton v. Hoyt, supra*, quoting from the report thereof in 75 Am. St. Rep. at page 643, the Court said:

"There is some conflict in the authorities upon the question whether a sovereign State is required to pay interest unless self-imposed, but the weight thereof seems to support the contention that it is not. The Supreme Court of the United States has adopted the rule that interest is not allowable on claims against the government, whether they originate on contract or tort, or arise in the ordinary business of administration, or under private Acts for relief, passed by Congress on special application. But it recognizes the existence of two well established exceptions—one wherein the government has stipulated to pay interest, and the other where interest is given by Act of Congress, either expressly as such, or under the name of damages; United

States v. Bayard, 127 U. S., 251. In a subsequent case of United States v. North Carolina, 136 U. S., 211, Mr. Justice Gray says: 'Interest, when not stipulated for by contract or authorized by statute, is allowed by the Courts as damages for the detention of money, or of property, or of compensation, to which the plaintiff is entitled; and, as has been settled upon the grounds of public convenience, is not to be awarded against a sovereign government, unless its consent to pay interest has been manifested by an Act of the Legislature, or by a lawful contract of the executive officers'."

The authorities are nearly all to the effect that a State cannot be made liable for interest on its debt, in the absence of an express promise or undertaking to pay interest.

III.

WEST VIRGINIA NOT CHARGEABLE WITH INTEREST AS DAMAGES.

In the absence of a promise to pay interest, under certain circumstances, it is sometimes recoverable as damages.

This subject is considered in a work of recognized merit, where the authorities are examined and cited, and, after discussing the principles governing the subject and giving many illustrations of their application, the following conclusion is reached as to the requisites authorizing the recovery of interest by way of damages for the breach of a contract:

> "In order to recover interest by way of damages for the breach of a contract to pay money, express or implied, it is necessary that both the amount to be paid and the time for payment be reasonably certain or susceptible of ascertainment. With these essentials established, the default of the debtor will render the right of recovery of interest complete.
>
> It is obviously necessary that the amount **due** should **be certain,** or at least susceptible of ascertainment, because without this the debtor cannot be in default."

16 Am. & Eng. Enc. Law (2nd ed.), 1014.

In *Bright v. James*, 35 R. I., 492, 87 Atl., 316, the suit was in equity for specific performance, and involved a question of the allowance of interest on a decree for purchase money, and, in the course of the opinion, the Court, quoting with approval from 22 Cyc., 1496, said:

> "Before interest, as damages, will be allowed for the breach of a contract to pay money, there must in general be a default in the payment of the principal debt; but interest is usually allowed from the time of such default. Obviously a party cannot be in default in the payment of a debt until the debt is ascertained; and hence default, so as to render a party liable for interest, cannot occur unless the sum due is certain. There must also be certainty as to the time of payment before there can be a default in payment for which interest as damages will be allowed."

IV.

UNEARNED INTEREST NO PART OF PUBLIC DEBT OF VIRGINIA EXISTING PRIOR TO JANUARY 1, 1861.

The promise of West Virginia upon which this suit is instituted is based upon the first part of Section 8 of Article 8 of her Constitution of 1861, which reads as follows:

> "8. An equitable proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, in the year one thousand, eight hundred and sixty-one, shall be assumed by this State * * * * *."

This is the full measure of her promise and her obligation, and the equitable proportion assumed by her relates to a debt created prior to January 1, 1861, not to a debt and its interest thereon afterwards accruing. Interest can in no sense be treated as or called a debt until it has been earned. While the debt itself may be interest-bearing, the interest which the debt has not earned cannot be treated as a part of the obligation itself in the ordinary and usual acceptation of the word "debt". A judgment cannot be entered for unearned interest.

> Illinois Steel Co. v. O'Donnell, 156 Ill., 624; 47 Am. St. Rep., 245.

This Court, in fixing the basis for ascertaining the amount of the debt as of January 1, 1861, did not treat the interest as any part thereof, **except**

that which had accrued and remained unpaid. Although this debt was interest-bearing, the Master, the parties to the suit and their counsel, as well as the Court, treated the aggregate amount of the interest-bearing bonds, exclusive of the unearned interest, as the debt of which West Virginia assumed an equitable proportion.

It has never at any time been suggested by any person connected with this case that the unearned interest constituted any part of the debt of Virginia as of January 1, 1861, with reference to which West Virginia is liable for an equitable proportion.

> "In determining the total amount of a corporate liability for the purpose of ascertaining whether its constitutional limit has been reached, unearned interest coupons attached to legal and outstanding bonds are not considered a part of its indebtedness within the meaning of the constitutional limitation."

1 Abbott. Munic. Corp. pp. 354, 355, § 160.
See also Epping v. City of Columbus, 117 Ga., 263, 43 S. E., 803.
Herman v. City of Oconto, 110 Wis., 660, 86 N. W., 681.
Jones v. Hurlburt, 13 Neb. 125, 13 N. W., 5.
Finlayson v. Vaughn, 54 Minn., 331, 56, N. W., 49.
City of Ashland v. Culbertson, 103 Ky., 161, 44 S. W., 441.
Kelly v. Cole, 63 Kan., 385, 65 Pac., 672, 675.
Gibbons v. Mobile & G. N. R. Co., 36 Ala., 410.

In *Epping v. City of Columbus, supra*, the fifth

and sixth points of the syllabus, as the case is reported in 43 S. E., at page 803, is as follows:

> "5. The debt of an individual, corporation, State, etc., when the word is taken in the sense that it ordinarily conveys to the popular mind, is the principal and accrued interest on a given date. Unearned interest is not, in such a sense, a part of the debt.
>
> 6. The debt of a municipal corporation, within the meaning of that provision of the Constitution which prohibits such a corporation from incurring a debt which exceeds 7 per centum of the assessed valuation of all the taxable property within the municipality, is to be ascertained by adding to the principal of all outstanding indebtedness the amount of all accruing interest that may be past due and payable on the date the amount of the debt is to be fixed. In ascertaining the amount of such debt, future interest which is not due on the day it becomes necessary to fix the sum of indebtedness is not to be counted. Unearned interest is not, within the true intent and meaning of the Constitution, a part of the debt of the municipality."

In the course of the opinion in this case the Court says:

> "The question to be determined is, what is the meaning of the word 'debt' as used in this paragraph of the Constitution? Does it mean principal only, or principal and accrued interest, or principal and all interest that is to accrue between the date of the in-

curring of the debt and the date the principal matures?

The word is to be taken in its ordinary, natural, common sense, popular meaning, unless the context requires that it should be treated as used in a technical sense. Constitutions are the result of popular will, and their words are to be understood ordinarily as used in the sense that such words convey to the popular mind. 6 Am. & Eng. Enc. Law (2nd Ed.), pp. 924-5. There is nothing in the paragraph under consideration which indicates that the term 'debt' was used in any other way than in its ordinary and popular sense. If a person unversed in the technical niceties of the law is asked what is the amount of his debts, his answer to the question in every instance would be an amount which would represent the present liability that he was under at the moment the question was answered. A farmer who had been so unfortunate as to be compelled to place a long time loan upon his farm, if asked what was the amount of the debt upon his farm, would unhesitatingly answer by giving the amount which would represent the principal of the debt and any interest that was past due and payable at the time the inquiry was made. * * * * * * * The law deals at all points with the man of ordinary prudence and average capacity as the standard, for the simple reason that communities and commonwealths are made up of persons of this class. * * * * Generally the meaning given to words by the learned and technical is not to be given to words appearing in a constitution. * * * * It may be conceded that the terms 'debt', 'bonded debt', 'mortgage debt', 'floating debt', and all sim-

> ilar phrases include, in a technical and strictly legal sense, both the principal and interest of the debt; but, when such terms are taken in their usual and popular sense, they never refer to anything but the principal and interest that may be past due at the time it becomes necessary to state the amount of the indebtedness."

And so the court held as the meaning of the word "debt" in this case, and as used in the Constitution of the State of Georgia, that it included only the principal and any interest that was past due at the time the debt of the State or county was to be ascertained.

In Herman v. City of Oconto, *supra*, the court in its opinion makes these pertinent observations.

> "Another claim made is that, in ascertaining the State's indebtedness, interest should be computed on the State loan and outstanding bonds for the entire period they are to run, and added to the principal. This is upon the theory that, when interest is expressly reserved in a contract it becomes a part of the debt. * * * * But is it a debt before it is earned? If so, then the most cases in the books relating to the ascertainment of municipal indebtedness have been wrongly decided. * * * * * * Interest is not a debt, within the meaning of the constitution, until it is earned and becomes due. When the money was borrowed the State became indebted for the principal sum stated, and agreed to become indebted each year in the future to a sum equal to the interest thereon. * * * * There may exist an obligation to pay * * * under

the constitution, the indebtedness as interest comes into existence each year as the obligation matures. It cannot be said to be present indebtedness, under any reasonable construction of the constitution."

In *City of Ashland v. Culbertson, supra,* the following appears in the opinion:

"If this new indebtedness of $10,000 be deducted from the amount of increase permitted by the two per centum clause of the Constitution, it appears that there still remains a margin large enough to authorize the issual of these bonds; unless, as contended by appellee, we are to estimate the interest *to be earned* on the bonds as part of the indebtedness incurred by their issual. This, we think, cannot be done. The indebtedness created by the issue of bonds to the amount of $50,000.00 is the face of the bonds. The term, 'Indebtedness', as used in the Constitution, was not intended, as we think, to include future interest. The law makers were not looking at this *incident* of the indebtedness, but to the indebtedness proper."

In Kelly v. Cole, *supra,* there appears, in the course of the opinion, the following:

"As interest earned upon a principal bond, represented by past due coupons, from its very nature inheres in and forms a part of the bond itself, by force of necessity such interest becomes a part of the 'actual existing bonded indebtedness'. But as to the unearned interest represented by coupons attached to the aid bonds sought

> to be refunded in this case, the holder of the principal bond has a present right neither to demand nor to receive the same. It is only by his forbearance of the use of the principal sum, evidenced by the face of the bond he holds, for a given length of time in future that the amount expressed in such coupons becomes the demandable property of the holder, or the 'actual bonded indebtedness of the county.' This is not only the natural and reasonable definition of the term 'bonded indebtedness', but it is the rule adopted by all courts in estimating the amount of indebtedness that may be lawfully incurred under constitutional and statutory limitations upon the power of municipal corporations to incur indebtedness. *The face value* of the obligation and the accrued interest thereon are alone considered as the debt. Interest to become due thereon in the future is not reckoned indebtedness."

The language of the Constitution of West Virginia is specific, definite and unmistakably clear in declaring that the State assumes an equitable proportion of the public debt existing prior to January 1, 1861, and the conclusion is irresistible that the equitable proportion of the debt assumed by West Virginia was the aggregate amount of the various interest-bearing bonds issued and negotiated by Virginia prior to January 1, 1861, not counting the unearned interest thereon.

The matter of the payment of interest in no wise enters into the obligation of the State in the first clause of Section 8 of Article 8 of the Constitution. If there be any such obligation upon West Vir-

ginia at all, it must be found in the second clause of the 8th Section of this Article; but, when we come to read this second clause, it becomes perfectly clear that the words "accruing interest" therein used in connection with the establishment of a sinking fund relate only to the new principal that has been declared by the ascertainment of West Virginia's equitable proportion, and for the payment of which, with the accruing interest thereon, the sinking fund was to be provided.

It is, therefore, respectfully submitted that the exceptions of West Virginia to the Master's report should be sustained; those of the State of Virginia and her bondholding creditors overruled: West Virginia given the credits allowed by the Master, increased by the exceptions interposed by her, and that upon the principal thus ascertained no interest should be charged or decreed.

A. A. LILLY,
Attorney General for West Virginia,

CHAS. E. HOGG,
JOHN H. HOLT,
Associate Counsel for West Virginia.

April 19, 1915.

ADDENDUM.

Table Showing Increase in Values Over Master's Report Contended for by West Virginia.

Richmond, Fredericksburg & Potomac Stock	$89,632.64
Orange & Alexandria R. R. Stock	358,894.80
Richmond & Danville R. R. Stock	60,000.00
Richmond & Petersburg R. R. Stock	28,765.76
Virginia Central R. R. Stock	90,197.18
Alexandria, Loudoun & Hampshire Stock	958,151.15
Virginia & Tennessee R. R. Loan	801,885.10
Norfolk & Petersburg R. R. Loan	191,584.55
U. S. Government Loan	966,237.01
Farmer's Bank of Virginia	48,130.00
Bank of Virginia Stock	107,181.00
Bank of the Valley Stock	24,195.00
Exchange Bank Stock	43,775.00
Atlantic, Miss. & Ohio R. R.	4,071,355.97
Manassas Gap R. R. Stock	2,105,000.00
James River & Kanawha Canal Co. Stock	852,333.00
Total	$10,797,318.16
West Virginia's 23½%	$2,537,369.76
Moneys paid to Virginia by W. Va. Counties after 1863	180,264.45
Moneys improperly charged to W. Va.	170,771.46
West Virginia's Increase	$2,888,405.67
Credits heretofore allowed by Master	2,868,839.49
West Virginia's Total Credits	$5,757,245.16